SEMINAR

Annual Extraordinary Number of

THE JURIST

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1943-45

VOLUME I

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1943

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Published annually by the School of Canon Law, The Catholic University of America, at 111 E. Chestnut Street, Lancaster, Pa., and Washington, D. C.

Communications concerning articles, reviews, subscriptions, or changes of address, should be addressed to the Wickersham Printing Co., 111 E. Chestnut Street, Lancaster, Pennsylvania, or the Business Manager, THE JURIST, The Catholic University of America, Washington, D. C.

Single copies $1.00

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SEMINAR

Volume I 1943

PRESENTATION

WITH the present Seminar-number, THE JURIST opens a series of studies in ancient and medieval legal history, to be henceforward published in a special issue once a year. Students in the vast field of historical jurisprudence have felt for a long time, and with growing acuteness in recent years, the need for an American journal professedly devoted to research in the legal sources and institutions of the past. Authors on subjects of legal history have been usually obliged to look for hospitality among the numerous Law reviews and historical magazines, unless they preferred to publish the results of their investigations in specialized periodicals abroad; and with the American production in this field thus scattered over many places, it has become extremely difficult even to take cognizance of the work done and to appraise its steady progress.

In beginning this new series, the editors of THE JURIST are led by the earnest desire to remedy, within the limits of their power, the situation and to offer a homestead in the Americas to writers on legal history. To emphasize the value of historical jurisprudence has been one of the tenets of THE JURIST ever since this magazine first appeared, over two years ago. The editors have no intention of banishing in future the history of both Canon and secular law from the regular quarterly issues. But it is one

thing to present occasional studies of legal history in a periodical which, by its nature and program, embraces so many fields of juridical science, and another to concentrate upon legal history for its own sake.

The latter, then, requires a rostrum of its own, and the editors take pleasure in acknowledging publicly their indebtedness to Professor Guido Kisch who was the first to insist, with deep insight, in his well documented paper on American research in medieval legal history [1] and in ensuing discussions, both orally and by letter, that such a rostrum is of imperative need, and who eventually suggested that THE JURIST provide for it.

The editors are also aware of the fact that the activities of a learned association such as the Riccobono Seminar of Roman Law in America, which has been a center of legal historical research for many years, will find in wider circles well deserved appreciation and encouragement if a select number of essays among those presented in its monthly conferences be included in this special issue—all the more since the war has put an end to the abstracts of proceedings published by the *Bulletino dell 'Istituto di diritto romano* for the Riccobono Seminar in previous years.

We trust that our new enterprise, the first of its kind in the Americas, will be welcomed by scholars, students and friends of ancient and medieval legal history. If this publication, modest as it may be at the outset, meets with a genuine interest in historical problems, fosters research and stimulates discussion, its seed will not have been sown in vain.

[1] THE JURIST, II (1942), 214-247.

CAUSE OF ACTION: ENGLISH AND ROMAN*

THE expression " cause of action " occurs in discussions of almost any part of the law, but it is of most interest, for comparative purposes, in three connections: defence on the ground that the facts alleged do not amount to a wrong; prescription of claims; and bar by previous litigation.

1. *Defence.* Counsel in our courts commonly say that there is no " cause of action "; the Roman lawyer in his writings says, in countless texts, that there is no action. There is a reason for this difference of language. It is not merely that the Roman lawyer is using the word *actio* to mean " right of action ", as opposed to the procedural steps to be taken. There is the further reason that " cause of action " and *causa actionis* do not mean quite the same thing. With us the " cause of action " is the immediate fact which gives a right of action, the breach of contract, the tort committed. But it has been shewn by Levy [1] that for the Romans, at least in personal actions, the *causa* was the fact grounding an obligation, i.e., not the fact which does create a right of action, but the relation which may lead to one. In contract it is the contract, not the

* EDITORIAL NOTE. The following study was originally sent by Professor Buckland, as topic for discussion, to the Riccobono Seminar of Roman Law in America. The editors of THE JURIST feel bound to make public portions of the letter by which the eminent English scholar kindly consented to publication in this magazine, instead of oral delivery and discussion, of his paper. On February 19, 1943, Professor Buckland wrote:

"...I hardly know what to say. The note was not written for publication but for discussion. I have no copy and I have no doubt that I have used unguarded language—it was intended to excite discussion, particularly from [Professor Ernst] Levy [of Seattle] to whose book [cited in note 1], though I disagree about details, I owe nearly everything I know about the matter. The difficulty is increased by the fact that proofs are hardly possible... But it might be possible for you to prefix an editorial note..., pointing out the nature of the writing..."

With the author's permission, the editors have completed some, and supplied other bibliographical references in the footnotes. For a comparative study of Roman and English Law in general, see W. W. Buckland and A. D. McNair, *Roman Law and Common Law* (Cambridge, 1936).

[1] Ernst Levy, *Die Konkurrenz der Aktionen und Personen im klassischen römischen Recht* (2 vols., Berlin, 1918-1920), I, 80 ff.

breach; in delict, the wrongful act, and in the latter case it will be seen that the two meanings coincide.

The difference between " cause of action " and *causa actionis* can be associated with a difference in the way of thinking. Our lawyers think more constantly than the Romans of the law in motion. The right which interests them is a right of action; the Romans, or some of them, think more of institutions. It is not accident that our quasi-contract always (with the doubtful exception of the stakeholder) means a right of action. With the Romans it is an institution which may or may not in the long run lead to a right of action, such as the relation between guardian and ward.

It is true that, as Levy notes,[2] the expression *causa actionis* is not common in the texts, but the notion can be gathered from many passages in the Digest[3] and elsewhere,[4] which tell us that if you have once sued on a contract, without taking certain precautions, you can never again sue on it even for an entirely independent breach. That means that your *causa actionis* is consumed and the *causa* which has been consumed is obviously the contract and not the individual breach of it.

The question arises: what is the reason for this difference? Our own way of putting the matter seems, to me at least, much the more rational. Why did the Romans take the other way? One easy explanation may be given. In an *actio stricti iuris,* so-called, e.g., on a promise of money by *stipulatio,* the claim ran: " If it appears that A owes B 10 *aurei* . . ." and this necessarily brings the whole promise into issue. In a *bonae fidei iudicium,* e.g., on sale, the statement ran: " Whereas A has made a contract of sale with B, whatever may be due in good faith on that account, condemn B to pay A " and this, too, brings the whole contract into issue. But to treat this as the explanation is, or may be, to treat effect as cause. Why in an action on sale did they not say: " Whereas B has committed such and such a breach of his contract . . ." ? Thus framed the action would bring only the individual breach into issue. I do not know the reason, but it may be that we have to go a long way back to find it.

[2] *Loc. cit.*

[3] Especially in D. 44, 2.

[4] E.g., Gaius, *Institutiones,* 4, 131a.

The contract creates an obligation. There is some evidence for the view, held by, e.g., Perozzi [5] and Betti,[6] that obligation in early Roman Law meant something much more serious than it does with us. A man who had undertaken an *obligatio* was, it is said, in a position of dependency perhaps only to the other party, perhaps in an inferior position in relation to men generally. We do not know much about *nexum* (though we guess a good deal), but with all the obscurities of the story it does suggest something like this. A *persona obligata* was on this view closely analogous to a *res obligata*, a thing given in pledge. It is quite possible to release part of a pledge, but it does not seem possible partly to release a pledge. In the same way one could not partially undo the position of subjection. The result is that the whole *obligatio* must come into issue and if the proceedings release the *persona obligata* at all, they must release him altogether. Of course, assuming all this, it is a cause, not a reason. The notion of "subjection" must have disappeared very early. Why did the developed law cling to its results? Any one, however, who has studied the history of any system of law, knows how conservative law is, how "rudimentary" structures long survive any justification they may have.

2. *Bar of action by lapse of time.* Here there is what at first sight looks a remarkable difference. With us, prescription of actions and Statutes of Limitation are rather prominent. In Roman texts, especially in the Digest, we hear very little about these matters. There is indeed a title (D. 44, 3) on *temporales praescriptiones* but it does not tell us much about the principles of the matter. The reason for the difference is, however, plain. In the age of classical law from which most of the Digest purports to come, nearly all civil actions and many pretorian actions were imprescriptible. The result was that the topic, being of only secondary importance, did not receive much attention. The point of interest for us is the question whether the Romans brought the principles of prescription into any relation with their conception of *causa actionis*. The answer seems to be that they did not, though there may be a hint of *causa actionis* in our sense in the *causa proxima actionis* of Neratius.[7] In D. 44, 2, 14, pr., Paulus uses the expression, *causa petendi*,

[5] Silvio Perozzi, *Le obbligazioni romane* (Bologna, 1903), pp. 58 ff., 65.

[6] Emilio Betti, *Corso di Istituzioni di diritto romano* (2 vols., Padova, 1928-1931), II, 674.

[7] D. 44, 2, 27.

which ought to mean "cause of action" in our sense, but seems in fact to mean only the legal relation.[8] It is clear that time could not run from the date of the contract—or a claim might be time-barred before the right of action had arisen. Indeed it is clear on the texts that time ran from the day when the right of action arose, or in some cases of privilege or excuse, from a later date. It has no relation to the arising of *causa actionis* in the normal Roman sense of that expression.

3. *Bar by previous litigation.* We have already mentioned this case, i.e., the question under what conditions a claim is barred by previous litigation. It has other points of interest. Here by far our best guide is Levy's *Konkurrenz*.[9] It is said by Beseler[10] that this book is not final (*abschliessend*), but this not very severe blow is followed by a plaster, for, says Beseler, there is no such thing as an *abschliessend* book, and he has just paid the book the compliment of saying that it *fördert uns weit*. No doubt the criticism is sound. Not all problems arising are settled. Not all Levy's solutions are convincing, though I cannot follow Beseler in many of his objections. But, in my judgment, Levy has taught us so much about the matter that he has put it on an entirely new footing. I am sure he would be ready to admit that he is not infallible. In what follows I am rejecting one of his opinions.

There is a complex of requirements for the application of this procedural bar, but the only one which concerns us here is the rule expressed in the two systems in much the same way: it must be the same cause of action, *eadem causa*. But though the expressions are the same, the meaning is not. We have seen what *causa actionis* meant for the Romans in actions on contract and delict. What did it mean in real actions; that is, in actions in which the plaintiff's claim was an assertion of ownership, or similar right which he then had to prove? Here there is no point of comparison, for real actions in this sense long ago passed out of our system.

[8] It may be worth noting that Professor E. H. Warren, *The Rights of Margin Customers Against Wrongdoing Stockbrokers* ... (Norwood, Mass.: The Plimpton Press, 1941), p. 53, shews Coke using the expression, *chose in action*, sometimes to mean "cause of action" in the English sense, *causa proxima actionis*, and sometimes to mean what is very nearly equivalent to the Roman *causa actionis*, i.e., the relation out of which a right of action may arise.

[9] Cf. n. 1, above.

[10] Gerhard Beseler, *Beiträge zur Kritik der römischen Rechtsquellen*, IV (Tübingen, 1920), 266.

For Levy, the answer is this: [11] here, as in personal actions, the *causa actionis* is the initial fact which sets up a relation between the two parties. That initial fact is ownership in the plaintiff; this is the *causa actionis*. This view creates certain difficulties. In personal actions it is clear that the *causa actionis* is a relation created between the parties, and it is rather straining language to regard as a relation between the parties a state of facts in which the defendant does not differ from anyone else in the world. It is true that if anyone interferes with my ownership I shall have an action against him, but any one can interfere with any of my rights, and if we treat the existence of the right as the *causa actionis*, ought we not to say, in a case of personal injury, that the *causa actionis* is the right I have in my body?

More important, however, than these speculative considerations is the fact that this opinion cannot be squared with the actual law. An illustration will shew this. You own a piece of land and are informed that I am, wrongfully, in possession of it. You claim the land from me and are defeated because you are unable to shew that I was in possession of your land or was in any way concerned in the alleged dispossession. A little later, I do actually take wrongful possession of the land. You again "vindicate", i.e., bring a real action against me. It is clear on the texts that you win, or, rather, that the earlier litigation is no bar to you. This is common sense and is illustrated by, e.g., D. 44, 2, 9 pr. and D. 44, 2, 17. Yet on Levy's principle you ought to be barred. The claim is for the same thing; the *causa* is the same, your ownership which has not changed, and we are the same persons (if this is material, which Levy says it is not).[12]

Levy, of course, sees all this, but he meets it by an argument which does not seem convincing. He says [13] that the rule that the action can be renewed is so self-evident that it is bound to be recognized even if there were no evidence for it. But, he says, it follows not from any doctrine of *causa*, but from the nature of ownership. This was not disturbed by the earlier action, which only consumed a certain right of action; it reacts to a new act of interference by the same or another person. The ownership provides another ground

[11] *Op. cit.*, I, 97 f.

[12] *Op. cit.*, I, 76 f.

[13] *Op. cit.*, I, 97.

of claim, *novam parit petitionem,* for which he cites D. 44, 2, 11, 5. The *consumptio* cannot extend further than the right of action itself; it has for scope only the legal state of things which the plaintiff could have urged in the first action.

To say that the result is self-evident and does not depend on any conception of *causa* does not avoid the difficulty. The fact remains that the result is not consistent with Levy's conception of *causa.* And his continuing ownership which *novam parit petitionem* is not supported by the text he cites, D. 44, 2, 11, 5. In that case there was a change; it is a new ownership based on a new title which *novam parit petitionem.* Indeed this text is inconsistent with Levy's view; it says that whatever ownership the plaintiff had was brought into issue in the first action. If that ownership was the whole *causa,* it was consumed and there could be no new action on it. It is true, as he says, that only the right of action is consumed. But we know also that what is consumed is the *causa actionis.* That suggests that in real actions, as in delict, *causa actionis* and right of action coincide; it is only a wrongful act of the party which sets up the necessary relation. The result is that the *causa* is something different, or something more, than the fact of ownership. By saying that the new *Verletzung* gives a new action, as of course it does, Levy is really saying, truly, that the interference with the possession is part of the *causa* just as, in delict, the defendant's act is part of the *causa.* And there also the plaintiff's interest is part of the *causa.* This is brought out more clearly in our law, which has no real actions in this sense, and in which infringement of a property right is a tort. It may be, then, that the *causa* in Roman real actions is title, coupled with wrongful possession in the defendant. At least this makes the texts consistent.

The difference between the conceptions of cause of action in the two systems brings out a difference in the practical working. In our system, the cause of action being the immediate facts which give a right of action, the fact that at a second attempt you use a different form of action does not prevent the procedural bar from applying, if what you are now suing for could have been recovered, assuming it to be due, in the earlier action. That is far from true in Roman Law. The *causa* being the juristic relation, the strictly procedural bar will not apply if your renewed claim, though for the same thing, rests on a different legal relation. Thus, if a thing was stolen, apart from the action on theft for a penalty, the victim would have a real

action (*vindicatio*) and a *condictio furtiva* to recover the thing or its value. *Vindicatio* is based on ownership; *condictio* is a personal action resting on what in late law was called Quasi-contract. One did not formally bar the other. A claim might be capable of being based on contract or on quasi-contract: one did not formally bar the other. Levy gives us many such cases. Of course the matter did not rest there. If the first action proved for some reason abortive, from, e.g., some procedural blunder, the other could be brought. But if the first action had been successful, it was manifestly unjust that there should be double recovery, and this was in practice prevented by methods commonly called the pretorian or judicial bar, the modes and forms of which do not concern us.

There remains another and much more striking difference. With us the bar is by the judgment. In our view, roughly speaking, the original claim has, by the judgment, been merged in a higher form of obligation, that created by the judgment, which we call a contract of record. This is similar to the Roman notion of novation. The parties, e.g., to a contract of sale, might, by making a formal *stipulatio* for whatever was due under the sale, supersede the original contract and merge it in the formal one. In the matter of procedural bar the Romans thought in much the same way, but they associated the merger and the bar not with the judgment but with joinder of issue (*litis contestatio*). Wlassak shewed [14] that *litis contestatio* was thought of in classical law as a procedural contract superseding the old relation, whatever that was, so that it was inevitable that the bar should be associated with that stage of the process. This notion of joinder of issue as a contract merely expresses the principle dominating Roman procedure that all litigation is based on consent, a notion to be found also in our law,[15] though we seem to have abandoned it relatively much earlier. And this notion seems to imply a conception of litigation as nothing more than a State-controlled arbitration, but it is only very early that this notion has much reality in either system.

[14] [Moriz Wlassak, "Die Litiskontestation im Formularprozess", *Festschrift zum Doktor-Jubiläum ... B. Windscheid* (Leipzig, 1889), pp. 55-138, especially 108, 111 ff., and frequently in his later writings, cf., e.g., "Anklage und Streitbefestigung im Kriminalrecht der Römer", *Sitzungsberichte der kaiserlichen Akademie der Wissenschaften in Wien,* philos.-histor. Klasse, CLXXXIV, i (1917), 3 ff.; *ibid.* CXCIV, iv (1920), 8 ff.—Ed.]

[15] [See, e.g., W. S. Holdsworth, *A History of English Law,* III (3d ed., London, 1923), 628.—Ed.]

Our rule seems the more rational: the Roman doctrine led to injustices with piecemeal remedies, and there is little or nothing of it left under Justinian. But the difference in practice between the Classical view and ours was not so great as it looks. We have seen that, though the conception of *causa actionis* as the basic legal relation rendered possible unjust double recovery, this was met by devices which we called the pretorian or judicial bar, of which the full story is told by Levy.[16] Similarly in our law where it is only the judgment which brings the estoppel into play, there is nothing, so far, to prevent one from bringing two actions for the same thing. But this is abuse of legal process, and there is machinery by which one of the actions may be stayed till the other is decided (which will give the defence of *res iudicata*), or even struck out altogether. Similarly, under Justinian, when the bar by joinder of issue was practically gone, there was legislation penalizing the bringing of actions on the same matter in different courts.[17]

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[16] *Op. cit.*, I, 423 ff.

[17] C. 3, 1, 12, 2; see also C. 2, 2, 4.

CORREALITY IN ROMAN LAW *

THE subject of joint obligations has always been and still is a source of as much confusion for the interpreters of the *Corpus Juris Civilis,* as it is for Anglo-American lawyers. In order to comprehend the type selected as the topic of this paper some preliminary observations of a general nature are in order. When two or more debtors promise the same thing, whether a sum of money or a tangible object divisible into ideal parts, one possibility is that each is bound for his proportionate share. This occurred in Roman law if the first person plural was used; no one could be held for the whole since no one had promised individually. On the other hand if each promises individually the natural result is " cumulation." If A promises 10 to C and B promises 10 to C, it is clear enough that the latter may recover 20. If the object of the promise is " Dobbin," payment of him by either releases the other because nobody can sue for what he already has. This, however, was a general rule unconnected with our topic, and does not affect the theory that Dobbin is due twice. If both debtors refused to pay Dobbin or wrongfully killed him, each would have to pay in full. On the face of the promise there is nothing to show that two different horses of the same name are not meant, and in fact their identity may be accidental and unknown as far as the promissors are concerned. By the same token an acceptilation, recital of satisfaction, granted to one debtor would not affect the other.

The next hypothesis is that the promised object is qualified as " the same." This is ineffective in the case of co-creditors, for there is no reason why one should not promise the same thing to as many persons as one will, binding himself for damages to all but the one elected to be payee.[1] However, in the case of co-debtors *idem* excludes cumulation, the debtor being thought to regard it as unnatural, if not impossible, to pay " the same " more than once. This is what is called solidarity by the interpreters, and *duo rei promittendi* in the sources whenever the issue is between it and division of the liability, as *e.g.* in the famous *Dig.* 45, 2, 9, pr. (discussed *infra* n.

* Paper read at the meeting of the Riccobono Seminar of Roman Law in America, Washington, D .C., May 10, 1943.

[1] Such is the sense of *alia atque alia* in *Inst.* 3, 16, pr.

24). There are two obligations, several or separate except as satisfaction by one is intended by all parties to release the other. Consequently, a formal recital of satisfaction would have the same effect. As for the so-called *datio in solutum,* it would be a question of fact whether it was received in full satisfaction or only in lieu of the liability of that particular debtor. The several nature of the liability may be observed in at least six different respects. Extinction of only one obligation is conceivable in four ways: novation, *litis contestatio* (hereinafter called consumption), and absolution, whether judicial or by the debtor's acceptance of a proffered oath. If the object were wrongfully destroyed by one debtor the other would be released for impossibility, and if the promised performance of one was personal to him the other's promise would be void by the rule that nobody can promise another's act. At this point the topic under discussion has been reached: all these six propositions would be untrue, if, instead of merely promising the same thing, the parties wished to go further and incur the same obligation. Extinction for one should release the other,[2] any " commission " by one would render the other liable, and one does not individually promise another's act if he is simply bound with him. Such was the Roman institution of correality. Since nobody could promise another's act, correality appears at first sight to be an impossibility.

The conclusion thus reached that correality is highly exceptional has never lacked its adherents,[3] but the almost universally accepted modern theory is exactly contrary. In a statute later to be mentioned Justinian abrogated the rule that correal debtors were released by suit against one (*i.e.* consumption), requiring that the judgment be satisfied. In texts of the Digest discussing the liability of joint obligors to a *bona fide* action we are told that the liability is solidary. As these, like Justinan's legislation, require satisfaction, the inference is drawn that they are interpolated. If it were not so general, this theory would not deserve mention, far less refutation. Its basis is that the liability of co-depositaries, co-tutors, co-lessees,

[2] This applies to a pact *in rem,* the impersonal *ne petatur,* which covers the obligation itself, but not to the pact *ne a te petatur,* which gave a personal equitable defense.

[3] Cf. Ch. Demangeat, *Des obligations solidaires en droit romain* (Paris, 1858), p. 184 ff.; W. A. Hunter, *Roman Law* (4th ed., London, 1903), p. 561; S. Perozzi, *Istituzioni di diritto romano* (2nd ed., Roma, 1928), II, 138, n. 1; G. v. Beseler, " Miscellanea Graecoromana ", *Studi in onore di Pietro Bonfante* (Milano, 1930), II, 74.

etc., was originally *eadem res*, hence consumed by suit. Yet in the *sedis materiae* (Dig. 44, 2, 14, pr.) *eadem res* is said to require identity of parties. Moreover, if, all three parties being together, C stipulates for Dobbin from A, who promises, and immediately thereafter for " the same Dobbin " from B, who promises, all admit that there was not *eadem res* and consumption. This admission is compelled by the fact that the procedure is not that required in the Institutes to produce correality. Yet the situation has every element of identity which could possibly exist in the case of co-tutors, *etc.* In any event it would seem plain enough that A's duty to do a given thing is not the same as B's duty to do it. A corollary of the theory now dominant is that the effect of Justinan's statute was to abolish the institution of correality, the relation being thereinafter necessarily solidary. Yet the Institutes carefully describe the special manner of its creation and the Digest contains no less than three examples of *consumptio litis*.[4] The reason for the latter phenomenon will appear later, but it should by now be clear that correality preserved all its five other characteristics except the one abrogated, a conclusion confirmed by the texts.[5] Finally, as will be noted subsequently, no change was contemplated in the case of active correality.

The premise is that from the natural standpoint those who make identical engagements are promising the same thing, not incurring the same obligation, for nobody could oblige himself to do or give what another must, or is to, do or give. The formality of the verbal contract offered a means of attaining the otherwise impossible result. As described in the Institutes the ritual consisted of two questions followed by two answers in the same order. If the contract were informal this would simply constitute two solidary obligations. It is otherwise here because of the rule[6] that no other legal transaction may intervene between question and answer. The intervention of the second question between the first question and answer prevents the answerer from being held to an individual solidary debt; he is bound, if at all, for the other's obligation as well. The same is true for the second, whose answer was preceded by that of the other. The objection that the whole process is a nullity because of the double interruption was met by the use of *idem*, which shows

[4] *Dig.* 11, 1, 20, pr.; 15, 1, 32, pr.; 43, 24, 15, 2.

[5] Cf. *e.g.*, *Dig.* 12, 2, 42, 3; 45, 2, 5; *id.* 18.

[6] See *Dig.* 45, 1, 1, 1; 45, 2, 12, pr. *i.f.*

that it is not other business to which the stipulator is addressing himself. Some consequences may be noted. If the second to be questioned answers first, he is bound and the other replying later is not, a complete transaction having intervened. If both question and answer are plural the liability is divided, but if either question or answer is separate the correal form is satisfied, for there is no basis for any other solution and no assignable ground for holding it all a nullity. Observance of the form made it possible for only one to be bound conditionally.[7] This has been held contrary to the "unity" theory,[8] but no reasonable objection is perceived to a conditional agreement to incur another's obligation. The same principle is obvious in the active case, where the debtor gave one answer after all the questions. The *idem* in the last question prevented the debtor's being bound alone to the last questioner, in which event the *idem* is the same as nothing. There is but one obligation since there was but one answer, but the *idem* binds all the questions together.

The real problem has now been reached, to comprehend how such a very special institution was capable of extension, for the texts make it clear that a surety, among others, was correally bound. Assuming that A is bound *ex stipulatu* to give the slave Stichus to C, the following formal promises by B may be considered. A novation was produced by *Stichum quem* (or *id quod*) *stipulatus es ab A*. The addition of *idem* prevents the novation, for if B is to owe anything, A must continue to be bound; otherwise B owes the same as nothing. If B is present and his question and answer follow immediately those of A, he may promise *eundem Stichum* simply; but otherwise it may be necessary for identification to add *quem A debet* or *promisit*. In any event this is no more than a promise of the same thing and produced solidary liability.[9] On the other hand B may sedulously avoid any mention of the object, ostensibly and perhaps in fact ignoring what it is, and specifying the *idem* by *quod stipulatus es ab A*. Hereby the desire is expressed to incur the verbal liability, *i.e.*, to owe correally, and the question is whether the

[7] See *Dig.* 45, 2, 4; *id.* 7; *id.* 11, 1; 2. The first of these texts can be read without the deletion of Mommsen, if the question is assumed to be whether the transaction is not void for incongruity or uncertainty (*recte obligantur*).

[8] W. W. Buckland, *A Text-Book of Roman Law* (2nd ed., Cambridge, 1932), p. 456, n. 8.

[9] Cf. *Dig.* 46, 1, 43.

desire can be recognized in spite of the fact that the complicated formality above described was needed to produce a result admittedly anomalous. One argument in favor of recognition is the nature of the alternatives, either nullity or a liability different (solidary) from the one undertaken. The main premise is that correality is a phenomenon dependent entirely on the special nature of the formal verbal contract. If a desire therefor is expressed in that form with reference to an obligation specifically described as of that same form, recognition is hardly deniable. Much more than this can be said. In form these promises are principal and accessory, one being unqualified and the other mentioning an alien promise. To the liability of a surety, the correal, as distinguished from the solidary, relation is perfectly adapted in every respect but the one (of consumption) altered by Justinian. When the principal debt is extinguished by the creditor's consent (novation, or offering the oath), or by the weakness of his cause (unfavorable judgment), the surety ought to be released. So too the fact that performance is personal to, or rendered impossible by, the principal should not affect the surety. Thus it was that in the form of a *sponsio* (the original word of art being *spondeo*) for *idem quod stipulatus es* suretyship, accompanied by correality, made its way into the law.

Formally and substantially the original surety's promise was so intimately correal that subsequent promises of this type were treated as correal regardless of the words used. Thus the formula of the *fideiussio,* which expressed its purpose by the word *fide,* need not contain the *idem, id* being sufficient.[10] All this is provided that the surety promise was formal, this requirement persisting even under Justinian for the otherwise so liberal *fideiussio.*[11] At this point an explanation becomes visible of the fact that a *sponsor* meant in Rome, as it still does with us, a surety. Since all stipulations were *sponsiones,* the reason is not immediately evident. On account of its special form the *sponsio* of *idem* was originally the only way of achieving correality other than in the special interlocking form. It became necessary to admit foreigners to a transaction originally confined to Romans using the verb *spondeo.* This was done for ordinary stipulations by allowing other verbs, and for suretyship by the

[10] Cf. *Dig.* 45, 1, 75, 6; Paul F. Girard, *Manuel élémentaire de droit romain* (7th ed., Paris, 1924), p. 794, n. 4.

[11] C. 4, 2, 14.

use of *fidepromitto*. There was obviously a more pressing necessity in the former case, where foreigners could not be bound at all outside the contract categories (if they then existed), than for admission to the very special and artificial relation of correality merely by *sponsio, i.e.,* otherwise than in the regular interlocking form. Moreover against this there was a logical objection; the promise of a foreigner with the verb *promitto* is not identical with that of a citizen who said *spondeo*. Presumably, then, for a long time a promise in the *spondeo* form by a citizen maintained its original exclusive character with regard to suretyship alone. So the word *sponsor* obtained its meaning and was excised by Justinian's compilers, who had no objection to the forms *spondere,* or *sponsio,* which latter had acquired a broader meaning with respect to the judicial wager.[12] It may be inferred that in the compilation a *sponsio* of *idem* would, lacking the word *fide, prima facie* create no more than the solidary obligation for *eundem Stichum.*

Another consequence of this necessary connection between a formal promise of suretyship and correality was the fact that use of the surety's formula by a co-creditor excluded cumulation and produced accessory correality.[13] However, the purpose of the surety promise caused it to differ in one respect from that of *correi,* who were not sureties for each other. By his *mora,* or default, a debtor alters and enlarges his obligation, shifting the risk of loss. The *correus* is bound for the original obligation only, but *mora* is one of the main risks against which one desires to provide by taking a surety.[14]

In Roman law the owner of a slave was an involuntary surety for his debts, in contract, *de peculio,* in delict, noxally. In two texts of the Digest we are told that co-owners sued in either manner are released by consumption.[15] In view of what has been said, it is not surprising that the relation should be correal: the owners owe not the same thing, which they did not promise, but are bound by the same obligation. As already indicated, correality is the proper relation for a surety. The difficulty is that the particular feature

[12] Cf. *e.g. Dig.* 50, 16, 7; *Inst.* 3, 26, 1.

[13] This is the *adstipulatio* of Gaius, 3, 112.

[14] Cf. *Dig.* 22, 1, 24, 1; *id.* 32, 4.

[15] *Dig.* 11, 1, 20, pr.; 15, 1, 32, pr. The latter is the text which after being accused of interpolation was vindicated by a fragment of a parchment discovered at Strassburg in 1903.

(consumption) was abrogated by Justinian. An examination of his statute [16] will supply the clue. It begins by saying that it was common in the stipulation of sureties specifically to exclude the consumption. The natural form would be to ask for the guarantee even if suit was brought unsuccessfully against the other debtors. After extending the rule to ordinary *correi*, the statute reiterates that since such pacts were valid and usual there is no reason why the law should not do the same, in order that creditors should not lose by their simplicity. The result is plain: the statute established a presumption of intent, it implied a pact, and so could have no application in the absence of a contract between creditor and surety. If the latter was involuntary, he deserved all that the logic of the law could give him. The fact that the statute was made to protect a creditor of several explains the absence of any change for correal creditors, to whom the old rules of consumption still applied.[17]

Another case for correality is that of indivisibility: using the first person plural several promise to create a praedial servitude or to construct a building. While the act remains possible of performance it must be demanded in full, but as each had promised only part, the result is burdensome. For this reason, and because the use of but one pronoun excluded the idea of several or solidary obligations, the relation was correal. Thus we are told that bankers who promise *simul* were *correi*.[18] The adverb and the texts, which speak of a single obligation, suggest the joint undertaking which would ordinarily produce division. However, if the contract is made in the course of the business, it is to the bank's funds that credit is extended as much if not more than to the individuals by shares. As the business was a public utility and subject to public regulation, the creditor was allowed the privilege of treating the contract as indivisible. To this, as in general to indivisible obligations the new legislation applied.

Hereto there is a puzzling exception in Dig. 43, 24, 15, 2, where several ordering another to violate a sepulchre are held correally and also with the benefit of consumption. As joint wrong-doers they ought in principle to be held cumulatively, and they would be

[16] C. 8, 40, 28.

[17] *Dig.* 45, 2, 2; 46, 1, 5 *i. f.*, on the former of which cf. Ribbentrop, *Zur Lehre von den Correalobligationen* (Göttingen, 1831), p. 5, note.

[18] *Dig.* 2, 14, 9, pr.; 4, 8, 34, pr.

so treated if sued in the proper delictal remedy *de sepulchro violato.* However, the assumption of the text is that instead of using that action the plaintiff elects to bring the interdict *quod vi aut clam.* This was a kind of preliminary injunction, not requiring proof of right in the plaintiff, and in no wise penal in its damages. The plaintiff was thus held to waive the tort; lacking which there is nothing but a common mandate ("we order") creating an indivisible duty, to remove the heap of dirt complained of. In the absence of a contract there is no room for the application of the new statute.

What has been said about joint indivisible undertakings applies to stipulations, which were construed literally and against the promisee. The principals to an informal contract, especially if subject to a *bona fide* formula, deserve no such consideration. Though the duty of a seller to deliver (*tradere*) was indivisible,[19] the agreement of several that "we will sell the horse" is not strictly construed to make them *correi.* They are ordinary solidary debtors, as common sense dictates.[20] The order in the case of the sepulchre thus created correality because the duty was in the circumstances quasi-contractual. The contractual duty created by a joint order was in fact solidary.[21] The parties are thought to attach more significance to the indivisible nature of the object than to the exact wording of the pact.

A final source of correality was the several judgment, an anomaly since such were in principle divided.[22] If, however, the judge should insist upon condemning *singulos in solidum,* the relation cannot be solidary without rendering the judgment conditional. The theory of correality that both are bound for the same debt is helpful, but regardless of Justinian's legislation the classical law cannot have imposed *consumptio litis* upon the judgment creditor seeking satisfaction by the *actio judicati.* It was presumably a precursor of Justinian's correal obligation.

The attempt has been made to show that as between correality and solidarity the latter was at all times the regular institution, and that apart from the special interlocking form the former existed only

[19] *Dig.* 45, 1, 72, pr. Though one can transfer partial title, nobody can give possession of half a horse.

[20] Cf. *Dig.* 13, 6, 5, 15; 45, 2, 9, pr.

[21] *Dig.* 15, 4, 5, 1.

[22] *Dig.* 42, 1, 43; 49, 1, 10, 3.

between principal and surety, and those divisibly bound for an indivisible object.[23] In the appended footnote [24] some problems of terminology are discussed.

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[23] Similar to correality in effect but different in theory is the case where but one action exists which the plaintiff may use against more than one defendant. The liabilities incurred by a sea-captain or *institor* might at the request of the plaintiff be transferred against the principal, cf. *Dig.* 14, 1, 1, 24. On the passive side this is the same as the action accorded to the assignee of a claim. Another example of a unique action appears in *Dig.* 9, 4, 4, 3, to be compared with *id.* 2, 1. The case of correality differed in that each debtor is sued *suo nomine* in a formula on its face no different from any action *ex stipulatu.*

[24] The text which has created most of the difficulty is 45, 2, 9, pr., stating that those obliged in *bona fide* actions or *ex testamento* owe like *duo rei.* Elsewhere the details of their liability are discussed and it appears to be solidary: *Dig.* 13, 6, 5, 15; 16, 3, 1, 43; 19, 2, 47; 30, 8, 1. Since according to what has been said there is no possibility of correality in such cases, the issue was simply between division and solidarity; and no other way of describing the latter in Latin is apparent. However, though this expression could be used of solidarity, where it is referable to formal promises, it presumptively means correality. Conversely, if the situation is such that cumulation is to be expected, the liability being for delict, the statement that one remedy excludes the other means solidarity, unless as in *Dig.* 43, 24, 15, 2 correality is expressly mentioned; cf. *Dig.* 9, 4, 39, pr.; 13, 1, 18; 13, 6, 6. The phraseology in *Dig.* 31, 16 need not imply correality; it is enough that it states a case of active solidarity, a most remarkable phenomenon. Ordinarily each of several co-creditors, *e.g.,* co-depositors, recovers his *interesse,* whatever it may be; but a will was binding by mere words. This did not render it capable of creating correality, resting as that ultimately did upon the formula described in *Inst.* 3, 16, pr. The interpolations in our field are confined to such texts as *Dig.* 45, 2, 8, 5, which ignore the difference between *idem* and the novatory *id.* Whether one wished to novate or become a solidary debtor was now a question of intent, but to go further and become a *correus* one had still to use the special form of *Inst. cit.*

SOME TRAITS OF MONETARY INFLATIONS IN ANTIQUITY AND THE MIDDLE AGES

1. *Monetary inflations in the classical world.*

EVERY currency which has been issued from the remotest ages to our days in the long run underwent inflation. The aim of the present article is to show how the problems that we must solve in studying ancient currency and its inflationary processes are akin to those presented by analogous phaenomena in medieval and modern times, prior to the expansion of paper currency and of notes of credit in the nineteenth century.

Monetary inflation of the ancient world manifests itself: (a) with a continuous increase in the prices of commodities, (b) with a continuous reduction in weight and in the fineness of the coinages, and a continuous increase of the number of the debased coins circulating.

Students of medieval and modern economy are familiar with monetary inflations because their interest in them grew after the first world war, when all European monetary systems which originally had been moored to the gold standard went adrift one after the other. In most cases the effort to link them again to a gold standard failed. Moreover, the new parities actually were merely fictitious because these parities could be maintained only by renouncing the most important economic functions of the currencies or at least by greatly reducing them. In antiquity, attempts to stabilize the money could be made with expedients quite different from our days, owing to the lack of a supervision of the ancient state of currency and credit. For the nature of the ancient currency was widely different from that of the currencies of the present day.

The development of credit and banks, which began in Europe during the seventeenth and eighteenth centuries, modified completely the character of currency. The expansion of credit, which is the main character of modern currency, is an absolutely new feature of the modern economy.

The functions of ancient currency were of course the same as those of modern currency. Money, to be money, should have several

functions. It must be (a) a common denominator for values, (b) an instrument of change, (c) a standard of deferred payments. A fourth function which some economists would attribute to money—the function of providing people with an almost invariable medium of exchange—was never actually discharged by money, as history proves.

In the few remarks on the subject that occur in ancient writers and in the practical measures of the authorities, we find them wavering between nominalism and metallism. Both conceptions were expressed in the Nicomachean Ethics: "Money has become accidentally a symbol of demand. Hence its name *νόμισμα*, because it exists not by nature, but only by law (*νόμος*), and it is in our power to change it or to make it useless. The same happens with money as with commodities; commodities have not always the same value, money shows a tendency to be more stable."[1] The conflict between the nominalistic and the metallistic theory of money has an historical root. Originally money was a piece of precious metal of a certain weight and a certain fineness which the state granted through the mintage. The acceptance of the earliest coins was not compulsory. In a second stage we are confronted with a money with the same characters of the earlier currencies, but money is considered as legal tender.

In a third stage the State issued money which had not the proper weight and fineness, but the State attributes to the debased coins the same legal qualities of the good money. Hereafter, money was considered under a nominalistic angle and the way to inflation was wide open. The ancient money, however, maintained always very apparent traces of its metallistic origins. A modern coin may be a piece of gold, of silver, of copper, a banknote, and even something else. Its legal value, however, is due to a relation to an ideal unity (the dollar, the pound, the franc, etc.) and is of a very abstract character. It does not depend on the material. Gold and other precious metals have a very indirect monetary function. Ancient coinage, on the contrary, is much more closely related to a fixed weight of metal.[2]

[1] Aristotle, *Ethica ad Nicomachum*, V, 3 (1133*a*, *b*).

[2] Cp. also Aristotle, *Politica*, I, 8-11 (1256*a*, 59*a*, *etc.*). For a useful survey of the history of monetary theories, see R. Gonnard, *Histoire des doctrines monétaires dans ses rapports avec l'histoire des monnaies* (Paris, 1935), and the excellent book of A. Nussbaum, *Money in the Law* (Chicago, 1939), which

The original correspondence of the monetary units and their metal weight disappeared in many ancient currencies after the inflations which voided the ancient unities—*drachmae, denarii,* talents—of their original meaning.[3] In medieval and in modern times, by the same procedure, livres, pounds, sous, *etc.,* lost their connections with the original unities.[4]

The classical currency supposed always an actual exchange of token coins with a golden and a silver coinage. Payments in token coins as money without any limit in its quantity were accepted by private persons as well as by the States. The States usually fixed, however, the rate of exchange of the token coins with minted silver or gold.

On the ancient monetary market, as a rule, gold and silver could be found circulating at the same time. They did not disappear alternately, as we might have expected, owing to the high mintage costs which prevented the coins to be melted if they were not too much overweighted. Moreover, the rate of exchange between the different coins was not fixed by the State once for all, but generally oscillated continuously around the exchange fixed by the State. Sometimes the market underwent temporary disappearances of silver or gold coins when the rate of exchange between silver, gold and token coins made the hoarding of the coins profitable; but then the rates of exchange were altered and the good money appeared again on the market. If we imagine that the rate of exchange could be

deals chiefly with modern monetary problems. Doubtless Aristotle was acquainted with monetary copper inflation and debasement of silver coinages, both of which were already frequent in his age. The very practice suggested to Aristotle the nominalistic theory of money, although at his time silver coinage had not yet undergone the extensive debasements which were frequent in the Hellenistic period.

The Talmudic scholars keenly studied monetary problems. See Eliézer Lambert, "Les changeurs et la monnaie en Palestine du Ier au IIIme siècle de l'ère chrétienne," *Revue des études juives,* LI (1906), 214-244, and Simcha Ezges, *Das Geld im Talmud* (Giessen, 1930). Probably it would be worth while to resume these researches, referring them closely to the practice of the ancient inflations. For a short survey of the monetary theories of the Jews see Sal. W. Baron, "The Economic Views of Maimonides," in *Essays on Maimonides* (New York, 1940), p. 188.

[3] For a very condensed description of ancient inflations see Angelo Segrè, "Circolazione e inflazione nel mondo antico," *Historia,* III (1929), 269-280.

[4] See Angelo Segrè, "La circolazione monetaria del regno dei Franchi", *Rivista storica italiana,* XLVIII (1931), 484 ff.

freely bargained, as it probably was to a limited extent, we may imagine that gold and silver on the market could coexist with token coins.

The monetary inflations of the ancient world, until the period of the decline of the Roman Empire in the third century, had always a territorially limited character. The most extensive among them involve the territorial Hellenistic states. Never did the silver standard disappear completely. The trade with foreign countries required, to a large extent, minted silver and more rarely, gold. The monetary inflations were spread, however, in the Hellenistic period through a great part of the classical world. We are rather well informed on the features of these inflations in Egypt, in Sicily, in Magna Graecia, in Rome, and in the Etruscan towns. Only Greece and the Seleucid realm kept their monetary standards intact in a period of general inflation.

The first monetary inflation which had a sort of universal character was the Roman one which began in the second half of the third century and which impressed the historians chiefly through the Edict of Diocletian. In this age the Roman Empire embraced nearly all of the civilized world. This period of fierce inflation which lasted over one century, from about 260 A. D. to about 360 A. D., is believed to have brought a great loss of precious metals to the Roman empire. Gold and silver are supposed to have been exported in the early Byzantine period in enormous quantities to the Eastern countries independent of the Roman empire. These losses of precious metals suffered by the Roman Empire have certainly been grossly exaggerated.[5]

The monetary inflation of the early Byzantine period may be investigated with a genuine interest also for our modern world, because of its magnitude and because it is linked with a large scale attempt to stabilize, and in some extent to freeze, the whole ancient economic life in a sort of planned economy which reminds us of a sort of war economy. Diocletian, after having established an uniform land taxation on the whole Roman Empire in the year 297, issued in 301 the most famous ceiling price list of the ancient world, the Edict *de pretiis rerum venalium*. The aim of the edict was to fix the prices of all sorts of commodities, of wages, of transportation, *etc.*, and to stabilize the currency on the basis of one pound gold = 50,000 *denarii*. This attempt did not succeed. In 304, shortly be-

[5] See A. Segrè, *Metrologia* (Bologna, 1928), pp. 464 f. and 486 f.

fore the abdication of the emperor, a pound of gold reached 100,000 *denarii* and the prices of commodities rose more than in proportion to the price of gold.

The whole procedure of the stiffening of the Roman economy into the Byzantine is a sort of degeneration of a relatively free economy to a sort of planned economy under the impact of the fiscal necessities of the Administration. The economy of the early Byzantine period is not yet a planned economy. In the main it is much less different from the economy of the first centuries of the Roman empire than it appears to many scholars, because no sweeping technical discovery changed the bases of the agricultural and of the industrial production of the classical world. The fiscal oppression of the Byzantine period in the Eastern provinces of the empire, more than anything else, was instrumental of a sort of return to the patterns of the ancient Hellenistic economies.

The ancient world never did devise a currency absolutely void of an intrinsic value, whose purchasing power could be kept fairly constant by a free exchange with gold and silver. Even in the early Byzantine period, gold circulated at the same time with token coins. They circulated together because the rate of exchange between the token coinage and the gold coinage was established at least partially by a bargain in the free market. This type of currency is essentially different from the currency of modern times when usually, in periods of inflation, the gold currency completely disappears from the market and when there is no possibility of exchanging paper money with minted gold. So far as we know, the only way in which the Byzantine administration used to exact gold and silver of its taxpayers was to levy the taxes in gold or silver in some particular cases (e.g., with the χρυσάργυρον); but even then the tax was usually levied in the ordinary debased coinage, exchanged at a fixed rate with gold and silver.[6]

The central administration of the ancient classical States had no possibility of controlling the amount of the monetary issues, as modern administrations do, with a centralized control of the money and credit market. Often, as e.g. in the early Byzantine period, the different provinces of the Empire, which had always their own mints, issued the coinage independently one from the other because they were ruled by rival emperors. Moreover these emperors had

[6] See A. Segrè, "Inflation and its Implication in Early Byzantine Times", *Byzantion*, XV (1940-41), 275 ff.

a genuine interest in pushing the inflation in the territory of the rival emperors by sending their debased coinage as far as possible into the enemy territory. But even in peaceful periods it is very difficult to see how the emperor could control the monetary issues of his mints. The famous revolution of the Roman mint at the time of Aurelianus shows at least that the mints tried to act with a certain independence of the central power.

The sole restraint to the inflation which could be devised in the classical world was the free mintage of gold and silver. The production cost of the precious metal could determine the amount of gold and silver which had to be brought yearly on the market. It is known that discoveries of mines in the classical antiquity produced monetary crises, which, however, were restricted in rather narrow limits.

Although currency inflations were frequent in the classical as well as in the medieval world, we are never confronted in the classical antiquity with periods during which a natural economy superseded the monetary economy. It is known, however, that wheat and other cereals were used for payment of taxes as well as for payments of the rents of land cultivated in cereals. It seems that the only official attempt, known in the classical world, to fix a constant unit of value represented by a commodity occurred in the time of Diocletian. In the Papyrus Cairo, *Journal d'entrée*, No. 57030B (312 A. D.),[7] the price of a *modius castrensis* of wheat was used as a key number, i.e., as a unit of value.

2. *Ancient, medieval and modern monetary inflations before the age of modern capitalism. Moneta imaginaria.*

The discoveries of Graeco-Egyptian papyri contributed to a large extent to show that the ancient world in its economic and social structure was very much akin to the medieval and to the modern pre-capitalistic world.

The history of classical currency is similar in so many respects to the history of medieval currency that the rapprochement need not be emphasized. Here, as in many other regards, the continuity of the social and economic life of the classical world in the Middle Ages

[7] A. E. R. Boak, "Some Early Byzantine Tax Records from Egypt", *Harvard Studies in Classical Philology*, LI (1940), 56 ff. (no. 4); A. Segrè, *Byzantion*, XV, 279.

depends on the persistence of the technical and economic bases of society.

The characteristic traits of the coinage were the same in the classical world as in the medieval and the modern world before the capitalistic age.[8] (a) There was a great incompleteness of knowledge and lack of skill in the technical as well as in the economic field. (b) The rulers had not even the will to issue a good currency. They saw in the coinage a source for filling their empty treasuries. This point of view is represented by the formulation of the theory of the exclusive right of the state to control money.[9]

There is, however, one very notable difference between the currency of the classical world and the medieval and modern pre-capitalistic currency. The former came to a unified monetary system under the period of the Roman rule.[10] The latter, on the contrary, used on the market the most varied sorts of coins of different ages and different countries.[11]

The coinage of most of the countries of northern and western Europe, as is well known, originated from the monetary system of Charlemagne, based on the silver pound, which Charlemagne divided into 20 *solidi* of 12 *denarii* each.[12] Everywhere in Europe people reckoned in pounds, shillings, pence; *livres, sols, deniers; libbre, soldi, quattrini.* These coins were constantly diminished in size. The pound kept its division of 20 *solidi* or 240 *deniers,* but lost continuously in weight. In Germany, in Hamburg and in Luebeck, a *mark* silver (about 234 gr.) was 2 pounds, 2 shillings in 1226 A. D. The weight of the pound gradually decreased. In 1506 A. D., 1 *mark* was 12 pounds, 8 shillings. In Strassburg, in the twelfth cen-

[8] W. Sombart, *Der moderne Kapitalismus* I, i (2nd ed., München-Berlin, 1916 [1928]), p. 404 ff.

[9] See e.g., Budelius, *De monetis et re nummaria* (1591); Sombart, *ibid.,* p. 407.

[10] Local provincial coinage under the Roman rule, except in Egypt, had comparatively little importance. Mostly the provincial currency was restricted to copper. When the local coinage was admitted, it was usually exchanged with the imperial money at a fixed rate of exchange. See A. Segrè, *Metrologia* (Bologna, 1928), p. 378 ff.

[11] Sombart, *ibid.,* p. 408 ff.

[12] Sombart, *ibid.,* p. 413 ff., and A. Segrè, *art. cit.* (n. 4), *Riv. storica ital.,* XLVIII (1931), 465-498. The pound and the *solidus* originally were only reckoning units as the Greek τάλαντον and the Greek μνᾶ.

tury, the *rauhe mark* corresponded to 240 pence; in 1362 A. D., to 540 pence.[13] In England the silver penny weighed 22 troy grains in the year 1300; 12 grains in 1464. In Spain, from the *mark* of Cologne 130 *maravedis* (a billon coin) were issued in 1312 A. D.; 2210 *maravedis* in 1550.[14] In France, from a *mark* silver 2 *livres tournois*, 19 *sols* were coined in the year 1309; in 1427 A. D., 8 *livres;* in 1473 A. D., 10 *livres;* in 1540 A. D., 14 *livres;* in 1602 A. D., 20 *livres*, 5 *sols;* in 1693 A. D., 33 *livres*, 16 *sols;* in 1713 A. D., 43 *livres*, 7/11 *sols;* in 1720 A. D., 98 *livres*, 2/11 *sols*.[15] The reasons for the depreciation of the coinage are usually considered to have been the financial necessities or the avarice of the rulers. In a period which did not know paper currency, the only way to inflation was the debasement of the coinage.

Sombart finds some difficulty in accepting the general view which attributes to a mere fiscal policy the debasement of medieval currency. He refuses to admit that all the rulers of the epoch were avaricious and deprived of scruples, and he looks, therefore, for additional reasons.

W. A. Shaw [16] attempts to explain the depreciation of the coinage between the fourteenth and the fifteenth centuries with an increase of the price of silver. Sombart [17] thinks that it was the technical nature of the coinage which brought about the depreciation. As soon, he says, as a country depreciated its currency, the neighboring country had to depreciate its currency, too. This argument of Sombart, who sees a depreciation of the currency spreading from one country to another, could be valuable if the rates of exchange for the different coins of the neighboring countries had been fixed once for all. But obviously the rates of exchange between the different currencies changed continuously, while the debasement of the coinage proceeded with different speed in the different countries.

The true reasons of the depreciation are mainly two, the first technical, the second fiscal. Obviously, the technical imperfection of the ancient coinage stimulated the hoarding of precious metals which were overweight. However, the skimming of the better coins,

[13] Sombart, *ibid.*, p. 414 f.

[14] Sombart, p. 415.

[15] Sombart, p. 415 f.

[16] *The History of Currency, 1252 to 1894* (2nd ed., London, 1896), p. 55.

[17] Sombart, *ibid.*, p. 416.

owing to the high cost of mintage, was limited to the pieces whose weight offset the cost of mintage. If the cost of mintage was, e.g., 10 *per cent.*, the pieces which were hoarded had to be more than 10 *per cent.* overweight.[18]

Usually the rulers issued coins with the same nominal value as the old ones, but lighter and sometimes with a lower title. They ordered at the same time that the new coins be not exchanged with the old ones at par. After a certain delay steps were taken by the rulers to take the old money out of circulation. If the difference in weight between the old and the new coins remained within the limits of the cost of minting, the coins were actually exchanged at par, if not, they were usually melted or hoarded as metal. The debasement of the coins preceded gradually and slowly. The rate of interest usually being high, the hoarding of money was not always profitable.[19] These considerations explain the passive attitude of the people toward inflation, in Antiquity as well as in the Middle Ages.

After a certain time it could happen that hoarded coins, as metal, were so much more valuable than the new nominals, that they could not be exchanged at par. The higher valuation of the older nominals in respect to the new ones is summarily described by A. Nussbaum: "On the continent, from the thirteenth to the eighteenth century, the circulating coins, domestic and foreign, were tariffed (valued) by the sovereign in terms of the official local unit with binding effects upon the subjects."[20] The unit was usually the *libra*, with its fractions, *solidi* and *denarii*. "Raising the coin, i.e., increasing the tariff value of a given coin, was one of the early methods for the relief of debtors, in which class the sovereign was frequently found; the practice resulted in the deterioration of the money, because raising the coin necessarily meant depressing the value of the abstract

[18] A. Segrè, "The Ptolemaic Copper Inflation, ca. 230-140 B. C.", *American Journal of Philology*, LXIII (1942), 185. See, for the skimming of the coinage, Sombart, p. 417 ff.

[19] Usually, periods of inflation are not periods of prosperity. The legal ratio of interest in Ptolemaic Egypt amounted to 24%. In Rome and in the Roman Empire, the *usurae legitimae* amounted to 12%. The anatocism, i.e., the interest of the interest, was forbidden, but loans were at short terms and were often renewed with the recapitalization of the interest. In the Middle Ages, the conditions of credit were still worse than in the Roman period.

[20] A. Nussbaum, *Money in the Law*, p. 10.

unit. It is comprehensible why this unit, the *libra,* should have been labelled a *moneta imaginaria* by contemporary writers." [21]

3. *Graeco-Egyptian papyri and our knowledge of ancient currencies.*

The available materials are sufficient to outline the trends of the ancient inflations, but the fluctuations in the rate of exchange of the coinage would require, even for rough representation, a material probably a hundred times as rich as that now at our disposal. Even with the material at present supplied, e.g., by more than 50 papyrological texts, I could only try the reconstruction of a trend in the Ptolemaic copper inflation in the period between 230 B. C. and 140 B. C.[22] Moreover, the copper inflations of the Hellenistic period may not be considered as genuine inflation, because it is not to be supposed that the main currency of that period was a copper currency.

In an earlier article, I tried to study the inflation and its implication in the early Byzantine period.[23] This investigation, which will be followed by a series of essays on Byzantine economy, has a much more general interest, because the economic and financial evolution of the Roman and the Byzantine empire is closely connected with the big inflation initiated in the second half of the third century.

This research led to the discovery that in the early Byzantine period the purchasing power of gold was immensely reduced. In the period of Diocletian, the purchasing power of gold was about one-fourth of what it had been in the first and second centuries A. D. in Egypt; and in the Constantinian age, about half as much as in the age of Diocletian. The very low purchasing power of gold in the early Byzantine period, together with bad harvests, bad conditions of agriculture, wars, high taxes, made this period one of the worst in the economic and political history of the world.[24]

[21] Nussbaum, *loc. cit.* The theory of the *moneta imaginaria* was developed by Molinaeus; see W. Taeuber, *Molinaeus' Geldschuldlehre* (Jena, 1928) and Taeuber's very comprehensive work, *Geld und Kredit im Mittelalter* (Berlin, 1933). See also W. Endemann, *Studien in der romanisch-kanonistischen Wirtschafts-und Rechtslehre* (Berlin, 1874).

[22] A. Segrè, *art. cit.* (n. 18), *Am. Journ. of Philol.,* LXIII (1942), 174-192.

[23] *Art. cit.* (n. 6), *Byzantion,* XV (1940-41), 249-279.

[24] *Byzantion,* XV, 261.

There is no question of abundant issues of golden coins in this period, which might have brought about an inflation of the gold currency. Even the reform of Constantine, who fixed the *aureus* at 4 scruples and created the standard *solidus* of the Byzantine period, has in no way the implication of a deflation based on abundant issues of *solidi*. How little mattered this issue of the *solidus* by Constantine is shown by abundant evidence.[25]

4. *Moneta imaginaria in Antiquity.*

The use of a *moneta imaginaria* is not a peculiarity of medieval and modern economy prior to the capitalistic age. Usually the debasement of the Greek coins went on with issues of debased copper coins as happened, e.g., with the Ptolemaic copper coinage of the period between 230 and 140 B. C. In this period, copper coins were considered as standard coins, and silver *drachmae* were continuously raised in copper *drachmae* by the Ptolemaic administration.[26] The copper talent, the copper *mina* and the copper *drachma*, compared with the silver *drachma*, behaved exactly as the debased *librae*, *solidi* and *denarii* did in the period between the thirteenth and the eighteenth century.

In Syracuse the copper talent was an unit of 120 *librae*—24 Attic *drachmae* at the time of Aristotle, while in the second century B. C. the same talent of 120 *librae* was valued at 3 Attic *drachmae*. An Attic *drachma* worth 5 *librae* at the time of Aristotle was raised to 40 *librae* in the second century B. C. The talent and the *libra* of Syracuse behaved exactly as the *libra* and the *solidi* of the *moneta imaginaria*. The examples of raising the coin may be very easily multiplied with instances supplied by the coinage of Magna Graecia, of the Etruscan towns, and of the Roman republic when the *denarius* of 10 *asses* was raised to 16 *asses*.

Under the Roman empire in Egypt the *denarius-drachma* was raised to 4 *drachmae*. The raising of the old *drachmae* and of the old *denarii* in the period of the great inflation of the early Byzantine age is much more important than any other raising of the coin in Antiquity.[27]

[25] *Ibid.*, p. 263 ff.

[26] A. Segrè, *Am. Journ. of Philol.*, LXIII (1942), 176 ff.

[27] It has been amply described in *Byzantion*, XV, 250 ff.

We may also emphasize that during the Byzantine age people reckoned in *solidi,* but used mostly debased coins.[28] Then the *solidus* was continuously raised in *denarii* and in *drachmae,* at least until the seventh century A. D.

We may conclude that the *moneta imaginaria* is not at all a peculiarity of the medieval and the modern pre-capitalistic age. It was the natural product of the debasement of the coins, in the Antiquity as well as in the period which began with the Carolingian age and which ended with the eighteenth century.

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[28] A. Segrè, *Metrologia,* p. 471 f.

REAL SECURITIES IN ROMAN LAW

Reflections on a Recent Study by the Late Dean Wigmore

LAST year, Dean Wigmore requested me to comment on his recent article on the pledge-mortgage idea in Roman Law,[1] although he knew that my views differ from his on certain points. I complied with this chivalrous desire in spite of the uncomfortable duty of criticism imposed on me, and was rewarded by the pleasure of studying certain writings of the great jurist which I had too long ignored. Professor Wigmore in his article opportunely recalls his early publications on real securities. He wrote in 1897/98 a series of contributions exploring a world-wide domain[2] with the means and the outlook of the master of comparative research he had become by that time. No other writer on the subject—not excepting Josef Kohler though his merits were high[3]—has covered so much ground with so penetrating an acumen.

In the moment in which my comment was ready to be published, the sad news arrived that John H. Wigmore has gone from us.[4] Mourning will be general. We have lost a man of extraordinary intellectual and moral features, a scholar of greatest gifts and widely extended interests. The fact that his knowledge, intuition and

[1] John H. Wigmore, "The pledge-mortgage idea in Roman Law: a revolutionary interpretation", *Illinois Law Review*, XXXVI (1941), 371-393. The sub-title alludes to Wigmore's thesis that by a revolutionary interpretation of Roman law (p. 371)—advised by Salmasius in 1639 and perceived by Wigmore in 1897, but re-discovered only by Martin Fehr (*infra*, n. 15) in 1910—the term, *hypotheca*, was found interpolated throughout the text of Justinian's Digest, replacing, in Wigmore's opinion, *fiducia* everywhere (p. 381).

[2] "The pledge-idea: a study in comparative legal ideas", *Harvard Law Review*, X and XI (1897-1898), containing: I. Introduction; Germanic and Scandinavian Law (X, 321-350); II. Jewish Law, Japanese Law, Chaldean Law, Slavic Law, Mohammedan Law, Hindu Law (X, 389-417); III. Greek Law, Roman Law, French Law (XI, 18-39).

[3] Josef Kohler, *Pfandrechtliche Forschungen* (Jena, 1882).

[4] Dean Wigmore died on April 20, 1943, at the age of eighty from the injuries suffered in an automobile accident.

achievement extended to Roman Law, and that his faith in comparative legal history continued to the very end of his long and rich life, appears to me, a guest of this country, like a blessing for future American workers in this field.

The following pages have been left unchanged. Though at times critical of Wigmore's opinions, they were written with reverence for the great scholar while he lived; may they be read now as an homage to his lasting memory.

1.

In Wigmore's recent paper, the actual topic is limited to Roman law; my own observations will be restricted accordingly.[5] It ought however to be borne in mind that it was upon the background of his earlier, very extensive studies in the history of real securities that Wigmore outlined the development of *pignus, hypotheca* and *fiducia cum creditore contracta*, and that it was the vastness of his horizon which enabled him to perceive the great lines of parallel evolutions delineated in the different national laws. Thereby, he has excelled in various points those "experts" of Roman law among whom he protested he did not belong.

One must remember what it means that such a vision could be realized at the close of the last century by a lone American scholar. As I now read Professor Wigmore's paper of 1898, I am reminded of vivacious talks in which I tried several years afterwards to convert Moriz Wlassak, and much later Pietro Bonfante, from their inveterate conviction that Roman law was impregnated with a specific spirit, that the Roman people had a unique legal mentality and that the sequence of legal phenomena in Rome was incomparable to anything else in history. Wlassak was alarmed by my comparative methods at a time when in his opinion the Roman sources, though rather thoroughly investigated, had not yet been exhausted; and Bonfante thought that comparison was on the verge of humbug (and there is no denying that it often was). Theirs was unconsciously the well known conception of Puchta which

[5] The development of Roman real securities was briefly outlined in § 104 of my work, "Grundzüge des römischen Privatrechts", in *Enzyklopädie der Rechtswissenschaft*, founded by F. von Holtzendorff, ed. by Josef Kohler, I (7th ed., Berlin-München-Leipzig, 1915: pp. 399-540), p. 493. For the convenience of the reader, an English translation of this section is given below, in the *Appendix*.

inspired even such a sober realist as Jhering to entitle his most important work: "The Spirit of Roman Law";[6] and which manifested itself when Jhering revealed the needs of the ancient every-day lawyers but did not see that these needs and the means of their fulfilment have features essentially corresponding with situations throughout the civilized world. In a sense, I feel myself related as much to Wigmore as to my own school. He had been aware of the fact that economic and social evolutions usually precede rather than accompany the changes of legal customs, and he knows that comparative methods give us questions rather than answers.

Surprise, however, is mixed with regret. I am sorry not to have known Professor Wigmore's studies on pledges before last year. They were equally unknown to other European writers on Roman law. I would have been happy to silence my own doubts by leaning on Wigmore, when I published several papers and a monograph on Greek and Roman real securities between 1906 and 1909[7] and endeavored to demonstrate the affinity of the Greek and Greco-Egyptian forms to the Germanic types rather than to the Roman institutions with which they had always been compared. When we see that, as late as 1931, Hazeltine in a remarkable paper[8] compared carefully the stages of the English mortgage only with the Roman *fiducia*, as though there were no better parallels to be found in the Greek papyri, it is all too obvious, what loss of time, what detours have been caused through insufficient intercourse among modern scholars. Although the study of contemporary private and public law suffers infinitely more from this evil, in legal history, too, international cooperation is not as full as we liked to believe.

Our case, in fact, illustrates an unfortunate absence of mutual understanding. I am compelled to say mutual, because, on his side, Professor Wigmore, notwithstanding his extraordinary familiarity

[6] R. von Jhering, *Geist des römischen Rechts auf den verschiedenen Stufen seiner Entwicklung* (4 vols., 5th ed., Leipzig, 1891).

[7] In particular: "Nachgeformte Rechtsgeschäfte, mit Beiträgen zu den Lehren von der Injurezession and vom Pfandrecht", *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Romanistische Abteilung*, XXVII (1906), 290-335; XXVIII (1907), 311-379; *Die Verfügungsbeschränkungen des Verpfänders* (Leipzig, 1909).

[8] "The Roman *fiducia cum creditore* and the English mortgage", Preface to R. W. Turner, *The equity of redemption* (Cambridge, 1931).

with old and new literature, has not appreciated the progress made in 1883 by Otto Lenel. Lenel's article [9] proved, with a certainty very rare in such matters, which fragments of the commentaries of Julian, Gaius, Paulus and Ulpian belong to *actio fiduciae;* hereby he discovered the elements for restoring the *formula* of the *actio fiduciae*, as well as for restoring the classical portions of comment which Justinian's Digest conserves in interpolated passages. While older writers such as Salmasius [10] and Wissenbach [11] could only make some flashlike guesses, this work disclosed the original texts. Prevailing opinion had affirmed already [12]—but now there could no longer exist any doubt—that *fiducia* in its various functions, and particularly for the purpose of security, was a living institution of the Empire. Since several mentions of *fiducia* in late sources were known, speculations went on only for divining at what time in or after the fourth century A. D. *fiducia* (or what was left of it) disappeared, leaving memory of it only in the terminology.[13] Unfortunately none of the contemporary books was accessible to Professor Wigmore.[14] It seems to me that Martin Fehr [15] has not modified this chronological problem. The common opinion, imme-

[9] "Quellenforschungen in den Edictcommentaren, § 1: Zur actio fiduciae", *Zeitschrift der Savigny-Stiftung, Rom. Abt.,* III (1882), 104-120, 177-180.

[10] Wigmore, p. 372, cites Claudius Salmasius, *De modo usurarum* (Leyden, 1639), cap. 13, p. 534, and notes (p. 386) that all Romanistic scholars ignored the interpolation theory of Salmasius. It ought to be added that my collaborators and I ignored it in editing the *Index Interpolationum* (3 vols., Weimar, 1929-1935), as did F. Ebrard, "Die Grundsätze der modernen Interpolationenforschung", *Zeitschrift für vergleichende Rechtswissenschaft,* XXXVI (1920), 1-27, when enumerating the precursors of interpolation critique. H. Dernburg, *Das Pfandrecht* (2 vols., Leipzig, 1860-1864), however, knew the work, cf. e.g. II, 75.

[11] Joh. Jac. Wissenbach, *Emblemata Triboniana* (1633), not cited by Wigmore, was given attention in the *Index Interpolationum,* for instance ad D. 13, 7, 9, 2.

[12] In particular under the influence of Dernburg, *Pfandrecht,* I, 94. See for instance Joh. E. Kuntze, *Cursus des römischen Rechts* (Leipzig, 1862 [2nd ed., 1879]), § 551, n. 2.

[13] See, for instance, P. Oertmann, *Die fiducia im römischen Privatrecht* (1890), pp. 52-72; P. F. Girard, *Manuel élémentaire de droit romain,* 2nd ed. (Paris, 1898), p. 513, n. 3; 7th ed. (1924), p. 551, n. 4.

[14] Wigmore, *Harv. L. Rev.,* XI, 31, n. 4.

[15] *Beiträge zum römischen Pfandrecht in der klassischen Zeit* (Upsala, 1910).

diately before Fehr's monograph appeared was explained by Manigk,[16] in 1909.

Our case is noteworthy inasmuch as it warns us that we should emulate in all branches of study the international community of scholarship which exists in the small groups of papyrologists and students of cuneiform. But to be sure, historiography was in no way essential for the value of Wigmore's results. His independence brought a welcome confirmation to the basic observations of other writers.

2. *Pignus as creating mere liability in rem.*

Wigmore wrote in 1898: "We have no direct evidence of a time when the pledgee was understood to have no personal action against the pledgor; but we have indications that such a principle once prevailed.[17] This admirable statement demonstrates how great is the value of legal comparison when operated by a sensitive hand. Independently of Wigmore, I found ten years later that *pignus* was practically always combined with appropriate agreements which allowed the creditor to keep the pledged thing in exchange for the debt due. Others believe that forfeiture was given without agreement; this is exactly Professor Wigmore's assumption. At any rate, the forfeiture-pledge was the basic type upon which the classical jurists erected their system. I have enjoyed finding in Mr. Wigmore's explanations the same survey of the three main consequences of the forfeiture idea as that which I later attempted; of course, our common materials inspired identical positions, while the Roman sources considered in their isolation suggested only separate questions, as to *hyperocha* and some other points, but did not lead to a view of the whole problem.

The three directions in which the Germanic documents teach us to pursue the idea of mere real security (as well as that of mere personal liability, e.g. of a hostage) are these: (i) As no personal action lies for the creditor, he can not claim a difference between the amount of his loan and a less amount recovered on the pledged thing — this difference being named *reliquum* in Rome, ἔκλειπον in the papyri, *Ausfall* in the German instruments. (ii) If the thing is damaged or destroyed before redemption, the creditor has no

[16] *Art.* "Fiducia", in Pauly-Wissowa, *Realencyclopädie der classischen Altertumswissenschaft*, VI, ii (Stuttgart, 1909), 2293.

[17] *Harv. L. Rev.*, XI, 25.

right to recover the debt; i.e. he has to bear the risk, *periculum*, κίνδυνος, *Gefahr* of the pledge. (iii) The pledgor has a right to redemption, but if the time for redemption elapses, he loses the thing without regard to its worth; the *superfluum, residuum*, ὑπεροχὴ, can not be claimed by the pledgor.

These are the universal features of mere real liability; the mechanism for modifying them has also been of a kindred nature in the conventional practice of ancient and medieval notaries. As in the first place it is always the creditor whose rights are favored, his interest as evidenced under point (i) was first served, viz. by a *pactum vendendi* which, as Professor Wigmore did not fail to perceive, conferred upon the creditor a right and no duty to sell the pledged thing. Wigmore has seen moreover [18] that the *pactum "ut quo minus pignus venisset, reliquum debitor redderet"*, had not always been *supervacuum*, as in the view of Pomponius in Paulus, D. 20, 5, 9, 1.

As to the details of the development on all three points, some doubt is possible, especially with respect to the period in which the pledge-action *in rem* reunited all those functions which it finally had under the *Corpus Juris*. Wigmore [19] sets some dates late under the impression that certain Imperial constitutions of the third century—which bring the accessory character of the pledge home to the consultants—marked a point at which the law had just emerged from its archaic stage. But although the argument that the office of the Emperor dealt with persons unfamiliar with the advanced pledge institution is excellent, we prefer to presume with Mitteis [20] that the inquiries derived from Eastern, or in some cases from Western provincial surroundings. The mass of this pre-Justinian material originating in backward spheres is greatly increased in the Codex and the Digest by the remnants of ancient Greek and Oriental elements, tenaciously preserved in the Byzantine mode of thinking which the compilers had to cope with. The compilation is impregnated by the flavors of so many civilizations that the chronology of institutions remains greatly in the dark. There is some more uncertainty with respect to the rules governing the risk

[18] *Ibidem*, p. 26, n. 2.

[19] *Ibidem*, p. 26, n. 1.

[20] *Reichsrecht und Volksrecht in den östlichen Provinzen des römischen Kaiserreichs* (Leipzig, 1891), p. 11.

of loss or deterioration; the doctrine of *custodia* plays a mysterious role in the classic law in general and has an even more dubious part in the liability of the pledgee.

3. *Pignus in the broader sense.*

Professor Wigmore had a splendid insight also into the relationship between *pignus* and *hypotheca*. He recognized that the term, *pignus*, " was applied indiscriminately to a pledge retained by the pledgor and to one handed to the pledgee ".[21] At the very same time, Girard,[22] like many other writers, treated *pignus* and *hypotheca* as though they were two different institutions, although he already knew that the latter was not borrowed during the principate from Greek law; Sohm [23] committed both mistakes much later. There was but one institution in the eyes of the Roman jurists—an important fact. Wigmore's conception was indeed much clearer than the ideas of Salmasius [24] and Moriz Voigt [25] to whom he wants to give all the credit.

Today it is commonly agreed that *hypotheca* was slowly derived through clauses and agreements from the institution of *pignus*. The two oldest cases of what later was understood as a *pignus* without possession are of special interest. In both cases a special relation was helpful to the creditor. The pledged things were not in the possession of the creditor, but the immovables which included them were. The landlord had not the possession of the goods brought in and pledged [26] by a *colonus*, but they were in such a situation that he could obtain actual possession with the help of the *interdictum Salvianum* [27]; and similarly the lessor could arrest the *invecta et*

[21] *Harv. L. Rev.*, XI, 23.

[22] *Manuel* (*supra*, n. 13), 2nd ed., p. 748; 7th ed., p. 811 ff.

[23] R. Sohm, *Institutionen des römischen Rechts*, see the third English edition by J. C. Ledlie, *The Institutes, A Textbook of the History and System of Roman Private Law* (Oxford, 1907), p. 354.

[24] *Supra*, n. 10, p. 536.

[25] " Das Pignus der Römer ", *Berichte über die Verhandlungen der Kgl. Sächsischen Gesellschaft der Wissenschaften*, XL (1888), 235, 236.

[26] Cato, *de agri cultura*, cc. 146, 5; 149, 7; 150, 7.

[27] Gaius, 4, 147; O. Lenel, *Das Edictum perpetuum* (3rd ed., Leipzig, 1927), § 266; Rabel, *Zeitschrift der Savigny-Stiftung, Rom. Abt.*, LIII (1933), 591.

illata of an *inquilinus* by foreclosure (*percludere*).[28] Probably this type did not originally constitute a real right equal to that of a classical *pignus*, but the contract authorized the creditor to seize the movables by self-help distress. This kind of agreement is of the greatest universal significance. I wonder whether a similar idea was not at the bottom of some form of landlord's distraint in English history, and still more whether the clauses permitting a creditor to seize the property of the debtor did not have a considerable importance in the general development of the English mortgage.

While my views just mentioned relating to the origin of *hypotheca* have been generally adopted,[29] only occasionally [30] has my suggestion been noted that it was a very un-Roman *formula* by which, according to Cato, *de agri cultura*, c. 146, 5, the *inlata in fundo* were pledged as *pignora* to the landlord; "*ne quid eorum de fundo deportato, si quid deportaverit, domini esto*", and that this clause was imported from contracts used by the Greeks in South Italy. We may be sure that the *hypotheca* did not come ready-made from Greece during the Principate or later—as Wigmore has seen in contrast to the writers he consulted — but (and this will certainly not conflict with his views) we have to take into account some very early, and numerous later influences exercised by the profuse and advanced use of forms and clauses in the East, during all the time of the late Republic, the Principate and the late Empire. This, quite naturally, applies also to the name of *hypotheca*.

4. *Fiducia.*

Thanks to his desire to develop his thesis, Professor Wigmore has raised two attractive questions which deserve renewed consideration, although the sources allow hardly more than guesses.

One problem was indicated when Wigmore wrote: [31] "The German jurists will probably never agree as to the nature of the debtor's right to restoration, whether it was a contractual or a real right, and whether it was of civil or of pretorian origin." Of course,

[28] Paulus, D. 20, 2, 9; Rabel, *Verfügungsbeschränkungen des Verpfänders* (*supra*, n. 7), p. 89.

[29] R. Monier, *Manuel élémentaire de droit romain*, first ed., II (Paris, 1936), no. 233.

[30] O. Eger, book review, *Zeitschrift der Savigny-Stiftung, Rom. Abt.*, XXXI (1910), 465.

[31] *Harv. L. Rev.*, XI, 31.

with respect to the original structure, there is no doubt that the *actio fiduciae* was instituted by the pretor, although there is some controversy on the question whether its *formula* was felt in the time of Hadrian as being *in factum concepta;* furthermore, *fiducia* was very strongly based upon an obligation to reconvey, and not upon a resolutive condition (which was excluded in Roman conveyances altogether), or on a suspensive condition, which was impossible in a *mancipatio.*

Yet, was there no development towards one of the other types of real securities which are found in so many other national laws? Since the research of Alfred Schultze in Longobard trust laws,[32] we are accustomed to contrast with the Roman system of *fiducia* (coupled with a merely obligatory *pactum fiduciae*) a universal Germanic conception of *Treuhand* which was constructed upon a conditional conveyance, and which in the case of mortgage, resulted in an automatic reversion of the pledged thing to the mortgagor upon payment. In practical use, both fundamental types have their merits and disadvantages. The modern German practice of *Sicherungsübereignung* ("security-conveyance") of movables, after the German Civil Code came into force in 1900, was developed without hesitation on the lines of the Roman unconditional transfer of the ownership with a mere obligatory duty to restitution on payment, although conditional transfers of movables are entirely possible under that Code and have been recommended by some professors of Germanic law. Moreover, the medieval Italian forms, comparable to certain English mortgages, were twofold: either due payment could result in a defeasance of the ownership which had been conveyed to the creditor on condition subsequent, or the instrument of conveyance was in terms absolute and the creditor bound himself to return the document to the debtor on redemption.[33] In my opinion, the latter type was not meant exactly as it appears, but its form was probably influenced by the Italian tradition of *fiducia.*

Whether the Roman form in the post-classical period was transformed so as to give the creditor only a right limited to its security purpose, as Manigk [34] believes, cannot be determined. It

[32] *Die Langobardische Treuhand* (Untersuchungen zur Deutschen Staats-und Rechtsgeschichte, ed. Gierke, Heft 49, Breslau, 1895), especially at pp. 105 and 210.

[33] Hazeltine (*supra,* n. 8), p. xxxiii.

[34] *Art. cit.,* in Pauly-Wissowa, *Realencyclopädie,* VI, 2295.

is true that such a change of structure would correspond with the tendencies along which trust institutions usually develop, and it would verify the existence of possible hellenistic influences. As a matter of fact, the ancient Athenian sale for repurchase (πρᾶσις ἐπὶ λύσει), though open to doubt in its details, may have been similar to Germanic types rather than to the Roman one. Greek property had the same character as the old-Germanic *eigen:* a bundle of rights which contracting parties could distribute between each other at will, in sharp contrast to the rigid, abstract and absolute *dominium ex iure Quiritium* of the Roman historic sources. There was a multitude of freely devised types of real security, as we find them disclosed in the Greco-Roman papyri, including among others conveyances upon condition subsequent.[35]

However, although we know the possibilities, we do not know whether any individual sort of contract was identified with *fiducia* in a period where its Roman form was no longer observed. The problem may be connected with the second question asked by Professor Wigmore in the following query.

Since *mancipatio* at an early time was considered in Rome too cumbersome to be performed, and was replaced by *traditio* with the effect of *exceptio rei venditae et traditae* and the *actio Publiciana;* since, on the other hand, livery of seisin in English law became finally a mere formal gesture or recital of words, was there not a more practical way to avoid also in the transaction of *fiducia* the archaic procedure of handling a brass balance? Wigmore, in explaining that *fiducia* had a full share in the life of Imperial Rome, recalls [36] his former proposition, which had been inspired by suggestions of Dernburg [37] and Kohler,[38] that "either *traditio* (mere symbolic delivery) sufficed or a mere fictitious recital of the formality in the document of transfer."

With respect to the proper Roman law (as contrasted with "vulgar" laws) and to the proper Roman period, before the disintegration of the Empire, some writers, long ago, believed that *mancipatio* could be legally replaced also in the transaction of

[35] Cf. the recent survey by Andreas Bertalan Schwarz, "Sicherungsübereignung und Zwangsvollstreckung in den Papyri", *Aegyptus,* XVII (1937), 241, 245-272.

[36] *Ill. L. Rev.,* XXXVI, 384.

[37] *Pfandrecht* (*supra,* n. 10), I, 94.

[38] *Pfandrechtliche Forschungen* (*supra,* n. 3), p. 81.

fiducia. Lenel [39] considered this hypothesis as categorically refuted by Gaius, 2, 59 and Isidore, *Orig*. V, 25, § 23, both of whom very definitely establish *mancipatio* or *in iure cessio* as a requisite of *fiducia*. Perhaps nowadays, some one would not regard this strong argument as absolutely removing all doubt, since old definitions of the civil law often were repeated without mentioning the more recent equitable modifications. However, Gaius does report the doctrine of the *Publiciana* fairly well. And, what is more important, Lenel's substantial argument stands unshaken: *traditio* is protected by the pretor only if it is done *ex justa causa*.

Lenel inferred this requirement from Paulus, D. 41, 31 pr., one of those fragments which belonged to the commentary on the *actio fiduciae*. The passage has become the object of numerous contradictory critical conjectures, but it is certain that it must have been adjusted by Justinian's compilers not only to the fact of the disappearance of *fiducia*, but also to their conception of *traditio* as the substitute of *mancipatio* in the common law. Therefore, where they say that *traditio* transfers property only where some *justa causa* preceded, Paulus evidently required *justa causa* for a *traditio* to be protected by the pretor. Even if we did not—though we should—agree with Lenel on the point that this was said precisely for *traditio* in contrast to the *mancipatio* (which did not require *justa causa* and was, hence, available for *fiducia*), it would still be true that we do not have any basis for assuming that *fiducia* was a *justa causa traditionis*. There is no title for *usucapio* either which could be applied in such a case. Thus, we must conclude that no *fiducia* existed using *traditio* instead of *mancipatio*.

Again, when Dernburg [40] suggested that *mancipatio* was replaced by a memorandum in writing " before five witnesses or a judge ", the private document and the public acts are two very different things, and moreover the periods are distinguishable.

As to Rome in classical time, there seems to be one possibility. We are familiar with the documents of *mancipatio* and *pactum fiduciae* in the evidentiary style, such as the tablet of Poppaea Note [41]; it was executed with the seals of the five solemnity wit-

[39] *Quellenforschungen* (*supra*, n. 9), p. 114.

[40] *Pfandrecht*, I, 94.

[41] *Mancipatio fiduciae causa* of Poppaea Note to Dicidia Margaris, 61 A. D. Zangemeister's later readings are reproduced in Girard, *Textes de droit romain* (5th ed., Paris, 1923), p. 825.

nesses, the *libripens*, the pledgor, and the pledgee. What if the documented rite *per aes et libram* had not been actually performed? We may think the document was given effect in practice, at least as a rule. The analogy to support such a hypothesis is furnished, of course, by the thousands of written stipulations of that period which must have been accepted at their face value in the courts, although in reality no oral question and answer were exchanged such as were still required by the civil law. The courts seem to have presumed the actual performance of the acts evidenced by the instrument of stipulation, at least if the parties had been present at the execution of the document.[42] Finally, the presumption became non-rebuttable, according to Paulus, *Sent.* 5, 17, 2—though we do not know how to date this fragment. This was the way Roman lawyers were compelled to approach the problem of perfecting a transaction by writing, a problem which had been solved centuries before by the Greek practice of what we call constitutive instruments. Symbolism as in medieval Germanic, or in ancient Roman law was alien to both.

The later history of *fiducia* is in the dark, in spite of not infrequent mention of it in Paulus' Sentences—that is, evidently in their oldest form before 300 A. D.,[43]—in the *Consultatio* (probably fourth century), and in subsequent sources, from C. Th. 15, 14, 9 (395 A. D.) down to such a late Venetian document as that cited by Wigmore,[44] of 1177 A. D. The question seems parallel to that of *mancipatio* with respect to which the prevailing opinion that after the middle of the fourth century (or at the latest after the end of that century) that name was just a venerable mask has been recently confirmed by Leicht.[45] In addition, we may presume an influence of the retrograde trend which brought the structure of the Roman obligatory contracts back to that of cash-and-carry agreements — a phenomenon well known with regard to the East but

[42] Paulus, D. 45, 1, 134, 2; Ulpian, D. 2, 14, 7, 12; Severus, C. 8, 37, 1 (200 A. D.); cf. P. Jörs-W. Kunkel, *Römisches Privatrecht* (2nd ed., Berlin, 1935), § 56, n. 9; H. F. Jolowicz, *Historical Introduction to the study of Roman Law* (Cambridge, 1932), pp. 429, 523.

[43] Ernst Levy, "Vulgarization of Roman Law in the early Middle Ages", *Medievalia et Humanistica,* No. 1 (Jan., 1943), 14, 26.

[44] Wigmore, *Ill. L. Rev.,* XXXVI, 383, n. 31.

[45] "Le ultime vicende della mancipatio in Italia", *Rivista di storia del diritto Italiano,* V (1932), 19-27.

which, according to Ernst Levy's research, was characteristic also of the Western development, from the time of Constantine on.[46] The abstract *mancipatio* might have given way to a sale, and the *pactum fiduciae*, to repurchase, with both transactions recorded in documents. However, the suggestion of Wigmore[47] that the institutions of *fiducia* and *pignus* were merged seems plausible. As our knowledge of Eastern and Western practice is steadily improving, perhaps some more precise particulars of how *fiducia* went down and what heirs to its name, if any, emerged, will come forth.

5. *Hypotheca.*

The most difficult part of Professor Wigmore's conception, for my understanding, is his thesis that Justinian's compilers "saw fit to substitute the word *hypotheca* for the word *fiducia* in every passage of the classical jurists selected for the Digest."[48] Let us distinguish three different questions.

(a) Wigmore reads, to use the symbols of the Index Interpolationum[49]: ⟨*fiducia*⟩ [*hypotheca*]. Now, this may account for some interpolations in such phrases as *pignus vel hypotheca*, the classical text running perhaps ⟨*pignus vel (sive) fiducia*⟩ — thus, for instance, Paulus, D. 20, 6, 11 is restored by those who trust the parallel passages of Paulus' Sentences.

On the other hand, Wigmore certainly does not want to invert his statement: not everywhere does [*hypotheca*] cover an original ⟨*fiducia*⟩. [*Hypotheca*] as substitute for ⟨*pignus*⟩ is a favorite of Martin Fehr whose contentions are indorsed by Wigmore. Fehr even believed that *hypotheca* has been inserted instead of *pignus* in the inscriptions *ad formulam hypothecariam:* reading *ad formulam* ⟨*Servianam*⟩ (or ⟨*pigneratitiam*⟩). This, in reality, is more than doubtful. But it is rightly admitted that in the frequent combination of terms, such as *pignus vel hypotheca*, the second substantive

[46] "Zum Wesen des weströmischen Vulgarrechts", in *Atti del Congresso Internazionale di Diritto Romano, Bologna e Roma ... MCMXXXIII,* Roma II (Pavia, 1935), 39; "Reflections on the first 'Reception' of Roman Law in Germanic States", *American Historical Review,* XLVIII (1942), 20, 25; G. G. Archi, *L'Epitome Gai* (Milano, 1937), p. 98.

[47] *Harv. L. Rev.,* XI, 32, n. 2, inspired by Salmasius, *op. cit.,* p. 537.

[48] *Ill. L. Rev.,* XXXVI, 381.

[49] Square brackets include words believed to be interpolated by the compilers; the classic words presumed to have been cancelled are put in pointed brackets.

was added more often than not, either by Justinian or by post-classical glossators.

There still remains, however, {*fiducia*} [*pignus*]. Lenel's proof [50] that in a great series of passages *fiducia* has systematically been replaced by *pignus* is unchallenged. Besides, this gives rise to "puzzling problems" as to how the Byzantines could combine the rules of *fiducia* with those of *pignus*,[51] and serves to confirm Wigmore's idea that the two institutions were nearly identified by the developments before Justinian. But there is no way of knowing, when we read either *pignus* or *hypotheca* in the Digest, what the original object of the passage was, unless we begin an exegesis with a more or less questionable principle as basis. In any event, there is no safe guide in any device for detecting interpolations.

(b) The point actually discussed in consequence of Fehr's monograph has been whether *hypotheca* is only frequently interpolated (for whatever term) or is always of Justinian's manufacture. In contrast to the enthusiasm with which Ludwig Mitteis greeted the radical thesis of his Swedish student,[52] the great majority of writers have been opposed to it. The latter is now the general attitude,[53] and I still belong to the group holding it; my approval of Wigmore's theory [54] does not apply to this problem. But in my view, which also seems to be the view generally held, this question is one of mere terminology. Whether one should prefer *hypotheca* or *pignus*, it does not change anything in the supposed character of the legal situations, since nobody contends that a pledge without possession was unknown to the classical jurists, or even that they have not been responsible for those great developments shown as *hypotheca* in the compilation. As a matter of fact, "*inter pignus et hypothecam tantum nominis sonus differt*", as *pignus* could

[50] *Supra*, n. 9.

[51] Buckland, "l'intérêt dans l'actio furti", *Nouvelle Revue Historique de droit français et étranger*", XLI (1917), 45, and *A Text-Book of Roman Law* (2nd ed., Cambridge, 1932), p. 432, n. 1.

[52] Book review, *Zeitschrift der Savigny-Siftung, Rom. Abt.*, XXXI (1910), 489.

[53] Buckland, *Textbook*, p. 425, n. 8; Sohm-Mitteis-Wenger, *Institutionen* (17th ed., München-Leipzig, 1928), p. 346, n. 8; Jörs-Kunkel (*supra*, n. 42), p. 156, n. 3; Monier (*supra*, n. 29), no. 231, p. 393, n. 2.

[54] See Wigmore, *Ill. L. Rev.*, XXXVI, 390, n. 69.

designate also *hypotheca.* Why, then, must this statement of Marcian (D. 20, 1, 5, 1) be adulterated? It underlines Wigmore's own experience that there was one institution, not two.[55]

(c) Again, we are confronted by a problem of quite other proportions: What actual roles were played by *fiducia* and *hypotheca,* side by side, in the Principate? Was *fiducia* modernized enough to be able to compete with a highly perfected *hypotheca?* The sources, taken alone, are too obscure to allow an easy perception of details and, hence, definite answers to these questions. But in the light of extant papyri and parchments, a repeated patient and unbiased analysis might ultimately give adequate results.[56]

APPENDIX [57]

The history of the Roman *real securities* is almost entirely limited to the conventional ones. At the beginning of legal history *pignus,* it is true, was a pledge with seisin, which could originate from a voluntary "stake", from self-help distraint or from seizure executed by a magistrate in the public interest. In the later republic, however, the contract of pledge overshadows the other early institutions. Only during the Empire was a private right developed upon the basis of pretorian *missiones,* and only from the time of the Emperor Pius did the extraordinary procedure, levying a distress by order of the judge (*pignus in causa judicati captum*), come into use, both institutions following the model set by the conventional pledge.

Very diverse are the modalities as to the situation of the creditor until the time for payment, and as to his conduct after the time of payment has arrived. With respect to his initial legal position in the Principate, security in the nature of a corporeal thing is granted either by conveying it upon trust (*fiducia cum creditore*) so as to furnish to the creditor the full real right under civil law, or by constituting a pledge by which the creditor enjoys a limited real right under pretorian protection. Sometimes the parties resorted to a conditional sale, the creditor buying the thing, in the pledge-contract or later, for the amount of the principal sum and the interest.[58] In the provinces moreover, many other forms were in use, sometimes as types of contingent rights not yet fully developed into absolute real rights—as they were known also to the Roman prehistoric period—which consisted of the conventional permit to distrain certain assets; or sometimes of a mere prohibition of aliena-

[55] Cf. Manigk, *art.* "Hypotheca", in Pauly-Wissowa, *Realencyclopädie,* IX, i (1914), 348.

[56] This was obtained in the matter of *fiducia cum amico contracta* by a thorough study of one of my former students; but I have not heard that it has been published.

[57] See *supra,* n. 5.

[58] Papinian, *Vat. Frag.* 9; cf. D. 20, 1, 16, 9: *hoc enim casu videtur quodammodo condicionalis esse venditio, et ita divus Severus et Antoninus rescripserunt.*

tion assumed by the debtor and preparatory to an ordinary enforcement of the debt through attachment.

On the other hand, with respect to the final effect of the security, the short-term credit was by far the more prevalent, although long-term investments occur; and the Roman legal rules oscillate generally between forfeiture of the thing, which at least is inherent in the fiduciary conveyance, and the sale of the thing whereby the creditor seeks payment from the proceeds. Again, these are not the sole remedies in Roman, and still less in Greek laws. Not seldom the profits alone of the thing serve to satisfy the debt (ἀντίχρησις of gain), or the profits result in a surplus over the debt available for penalizing a delay (default ἀντίχρησις).

Definitely emphasized by the Romans is that figure which has been rightly considered as the chief type of Roman pledges, viz. the limited real right constituted to the effect that the creditor be able, (not necessarily compelled) to satisfy his claim out of the value of the thing. This institution was reached through a long and not entirely peculiar evolution. The historic development was perfected in strong analogy with that of other nations, starting, on one hand, with the pledge of possession and (later!) the conveyance for security, and obtaining slowly recognition as a mortgage without immediate transfer of possession to the creditor; starting, on the other hand, with forfeiture, which probably abolished the debt, and ending, in the classical period, in the conception that selling the thing and distributing the proceeds among the creditors and the pledgor are implied conditions of the pledge convention; in the postclassic period, that these are even its only licit effects.

The particular merits of Roman jurisprudence proved themselves when (a) with a unique clarity the position of the creditor before the date of payment was strengthened so as to elevate his mere expectancy to the dignity of a real right which he could enforce against any one through the pretorian action; (b) subsequent mortgages were gradually made possible; (c) pledge, including mortgage and even *fiducia* were brought into due dependence upon the personal right to be secured—but the principle that the pledge was accessory to the debt could be occasionally set aside for the obtaining of more equitable results.

To be sure, these progressive steps were not accompanied by sufficient legislation. The invisible *hypotheca* should not have been allowed to participate in the pretorian process of being constituted in a formless agreement. The only help existed in Egypt as long as the archives flourished. The resulting uncertainty of credit on landed property grew steadily worse, as the plural mortgages which became possible through the *hypotheca* and the liabilities upon the debtor's general assets grew more and more numerous. The worst stage was reached when in the late Empire, tacit general mortgages were set one on the top of the other, and the prudent caution of the documentary practice vanished. What calamity was caused by the absence of publicity in the constitution of securities must have been felt acutely, probably in the late fifth century more sharply than in the Principate, as Emperor Leo's law of 472 A. D. (C. 8, 17, 11) would indicate by granting special privilege to a mortgage evidenced by public document.

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NATIONALISM AND RACE IN MEDIEVAL LAW

1. *Sentiments of Nationality in the Middle Ages.*

EVER since modern nationalism entered into the focus of political practice and theoretical research, the interesting problem was posed whether that concept existed in some form as early as the Middle Ages. The question attracted scholarly attention particularly in the period between the two world wars, when the origin and the historical development of nationalism in all its phases and with all its concomitant phenomena were studied all over the world. True, the modern idea of a national state and the modern concept of democratic nationalism are born of the French Revolution. It is, however, equally true that, over half a millennium before the creation of the modern concept of nationhood and the founding of the first modern national state in France, certain factors are found already at work, and characteristic elements are discoverable, which led to the awakening and expression of sentiments of nationality in medieval Europe. Although conceived by intuition rather than on the basis of penetrating research in medieval concepts and developments, a remark by Carlton J. H. Hayes states correctly: "It should not be assumed that there was no consciousness of nationality among civilized peoples in ancient or medieval times." [1]

To prove this statement, very detailed and minute research with regard to every individual nation is naturally required. Although considerable work on such problems has been accomplished by a number of scholars during the past one and a half decades, their achievements mark only an incipient stage. Nevertheless, this might be the right moment to survey briefly the present state of secure knowledge, to submit some critical notes of evaluation for

[1] Carlton J. H. Hayes, "Nationalism—Historical Development", in *Encyclopaedia of the Social Sciences,* XI (New York, 1937), 240; cf. also the authorities cited by Karl G. Hugelmann, "Die Rechtsstellung der Wenden im deutschen Mittelalter", in *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte,* Germanistische Abteilung, LVIII (1938), 215, note 1.

scholarly examination, and finally to point out—even if in a very sketchy manner only—the implications of the concepts of nationalism and race for the realm of medieval law. Obviously, no attempt can be made to be exhaustive in any respect, since the problem calls for scholarly treatment in several volumes rather than merely in a few pages. Notwithstanding all this, the writings and sources here to be examined and the present state of research in medieval legal history seem fully to bear out the exposition and conclusions here presented.

As is well known, according to modern political theory the concepts, nation and nationality, have been subject to two interpretations.[2] To the one, which is of a political nature, nationalism and the national movement appear as a continuation of the democratic movement which, after achieving the elimination of all privileges and differentiations, of every form of aristocracy in its own midst, proceeds to set up the nation as against the outside world. Nationalism of this sort assumes an emotional character which easily becomes aggressive, tends toward the negation of alien peoples and ethnic groups, and rises to extreme forms of passionate hostility to all foreign manifestations. In contrast to this political concept of nation and nationality, there is the view of the nation as of a rather ethnic and cultural phenomenon. Differences in language and culture as well as variations in religion and customs result in the formation of social groups which constitute fundamental national units.

To study the rise, expression, and intensification of national feeling in the Middle Ages by way of a historical analysis requires more than a merely mechanical search for some characteristics of, or similarities to, modern nationalism or race sentiment in medieval sources. The purely external projection of modern ideologies into the medieval past and the latter's subjection to present-day political reasoning must unfailingly lead to gross misconceptions, by reading into the sources what medieval man never could have conceived. Fortunately very few authors—although some distinguished scholars among them—became victims of this method of "hyperhermeneutics."[2a] It was a legal historian, Karl G. Hugelmann, who, in a

[2] The following exposition is based on Max Hildebert Boehm, "Nationalism—Theoretical Aspects", in *Encyclopaedia of the Social Sciences,* XI, 231 f.

[2a] Cf. also the thought-provoking essay by Carlton J. H. Hayes, "The Church and Nationalism—A Plea for Further Study of a Major Issue", in *The Catholic Historical Review,* XXVIII (1942), 1-12; p. 2: "Nationalism,

series of stimulating scholarly studies,[3] took his point of departure in purely political views of our day and thus succumbed to the dangers of a *gegenwartsnahe Fragestellung*. His main thesis presented in his own words may illustrate this statement: [4]

> "This people, the German people, had in the Middle Ages, too, the affective consciousness of its national (*völkische*) individuality; even then it felt itself as a great historical unity; it claimed already in the Middle Ages the right to self-determination, nay, it had the consciousness of being the bearer of the State, which the people itself designated as the German Kingdom. This Kingdom is the 'German National State of the Middle Ages.' In this German National State national (*völkische*) individualities, and also groups of alien nationality (*fremd-völkische*), found legal consideration."

This phrasing in itself is much-revealing. Judicious Swiss and American scholars hold a quite different opinion. Hans Fehr, a legal historian of distinction, is skeptical with regard to an early rise in Germany of both a national sentiment and the fatherland idea.[5] Similarly the late James W. Thompson, the well known

being so pre-eminently a modern phenomenon, has been left largely for historians of recent times to explore and explain; and their tendency, quite naturally, is to neglect the distant past or to read into it their own current preconceptions."

[3] "Studien zum Recht der Nationalitäten im deutschen Mittelalter", in *Historisches Jahrbuch der Görres-Gesellschaft,* XLVII (1927), 275-296; XLVIII (1928), 565-585; (for criticism see G. Kisch, *Proceedings of the American Academy for Jewish Research,* VII [1935-36], 121 ff.); "Die deutsche Nation und der deutsche Nationalstaat im Mittelalter", in *Historisches Jahrbuch der Görres-Gesellschaft,* LI (1931), 1-29; 445-484; "Mittelalterliches und modernes Nationalitätenproblem", in *Zeitschrift für Politik,* XIX (1930), 734-742; "Die Rechtsstellung der Wenden im deutschen Mittelalter", in *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte,* Germanistische Abteilung, LVIII (1938), 214-256.

[4] Hugelmann, "Die Rechtsstellung der Wenden im deutschen Mittelalter", p. 216: "Dieses Volk, das deutsche Volk, hatte auch im Mittelalter das gefühlsbetonte Bewusstsein völkischer Eigenart, es fühlte sich schon damals als grosse geschichtliche Einheit, es nahm schon im Mittelalter das Recht der Selbstbestimmung in Anspruch, ja es hatte das Bewusstsein, der Träger des Staates zu sein, den es selbst schon als das deutsche Königreich bezeichnete. Dieses Königreich ist der 'deutsche Nationalstaat des Mittelalters'. In diesem deutschen Nationalstaat fanden völkische Individualitäten, auch fremdvölkische Gruppen, rechtliche Beachtung."

[5] Hans Fehr, "Die Staatsauffassung Eikes von Repgau", in *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte,* German. Abt., XXXVII (1916), 213: "Leider fehlen uns die Anhaltspunkte, um festzustellen, wie weit in diesem

American medievalist, emphasized that in medieval times the Germans almost always thought of themselves either in a tribal capacity, as Saxons, Franks, Swabians, Bavarians, *etc.*, or as citizens of the Holy Roman Empire. "But national self-consciousness never developed among them as among the French and English."[6] Needless to say that these scholars' views are based on well documented reasoning. One may, moreover, point to the fact that the sense of an all-embracing and national law was weak in medieval Germany. Practically no Reich legislation existed from the tenth to the twelfth century; and even later the central legislation was restricted to "land-peace" laws, to the regulation of constitutional problems, and of such as concerned the relationship of State and Church.[7] None of the great medieval law-books undertook a systematization of universal German law. After all, the unification of the law in Germany was accomplished only by Roman and not by German law. In the course of the following study, the opportunity will be at hand of seeing some more of Hugelmann's hypotheses in the proper light.

Somewhat different is the argumentation of the German historian, Albert Brackmann.[8] Although warning himself against measuring the past with the standards of the present (*die Vergangenheit an Masstäben der Gegenwart zu messen*), he believes he has found the origin of the modern national State in the Norman State of Southern Italy. True, the tremendous increase in political power and importance of the institution of the King-and-Emperor in the days of Frederick Barbarossa—fostered by the re-awakened study

Volke ein *Volksbewusstsein* lebte. Wir wissen nicht, ob nach irgendeiner Seite die Vorstellung bestand, dass sich über den Einzelnen das Volk als Gesamtheit erhebe und über dem Einzelbewusstsein ein Gesamtbewusstsein ausbilde. Ich möchte es bezweifeln. Und ebenso skeptisch verhalte ich mich zum Vorhandensein des *Vaterlandsgedankens*. Dieser Gedanke scheint sich vielmehr an das einzelne Geburtsland, an das Stammland oder ein engeres Gebiet desselben angeschlossen zu haben. Das Gefühl einer inneren Zugehörigkeit und Anhänglichkeit aller dem ganzen Reiche gegenüber vermochte ich aus den Spiegeln [i.e., the medieval German law-books] nirgends herauszulesen."

[6] James Westfall Thompson, *Feudal Germany* (Chicago, 1928), p. 366 ff.

[7] Claudius von Schwerin, *Grundzüge der deutschen Rechtsgeschichte* (Munich-Leipzig, 1934), p. 123 ff.

[8] Albert Brackmann, "Der mittelalterliche Ursprung der Nationalstaaten", in *Sitzungsberichte der Preussischen Akademie der Wissenschaften*, phil.-hist. Klasse, 1936, pp. 128-142; also separate edition.

of Roman law in Bologna—was an efficient factor in arousing national sentiment and promoting a national State in Germany. But according to Brackmann, the new State-mindedness of the Norman type (*das neue staatliche Denken normannischer Art*) became the most influential model of the medieval German national State. It is characteristic that he, like Hugelmann, was strongly influenced by National-Socialist political theories and practical politics.[9]

In attacking the problem of the foundations of nationalism in the Middle Ages, the majority of scholars withstood the dangers of present-day political emotionalism. They approached the question with different methods and measuring-rods. They sought for the roots and rudiments of the expression of nationhood, which were the foundation for the later growth or development of the national sentiment, equivalent to its modern appearances. They were cognizant of the fact that every age and every society has a concept of politics, law, and national culture peculiarly its own. We must let this concept speak when we speak of it. This, then, is the only way to bring to light in an unadulterated form the genesis and the development of a definite concept in those fields of human expression.

Different avenues of approach have been chosen, and various countries of different evolution have been subjected to study. The summary survey here to follow will, of course, consider mainly aspects of legal history. All of them are undoubtedly rooted in the two most important factors of national being: a people's consciousness of its own existence, and its will to nationhood; both of them the most important expressions of the supreme political impulse.

At the International Historical Congresses in Oslo (1929) and Zürich (1938), the problem of "medieval nationalism" received considerable attention.[10] Professors Marcel Handelsman of War-

[9] Cf. Brackmann, *op. cit.*, p. 16 f.; Hugelmann, *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte*, German. Abt., LVIII (1938), 214, note 1 (Hugelmann took active part in the abortive Nazi insurrection in Austria in 1934 and wrote his essay during his subsequent detention).

[10] Cf. Alexander Domanovszky, "Der ungarische Nationalstaat im Mittelalter", in *Bulletin of the International Committee of Historical Sciences* (Eighth International Congress, Zürich, 1938), Vol. X, Part II, No. 39 (Paris, 1938), pp. 240-243; Joseph Meyers, "Die Entstehung des luxemburgischen Eigenbewusstseins im Mittelalter", *ibidem*, pp. 264-267; Ferran Soldevila, "La formation du sentiment national en Catalogne au Moyen Âge", *ibidem*, pp. 261-264; and the other essays to be mentioned hereafter. Cf. also the bibliography in Heinrich Finke, *Historisches Jahrbuch*, LVII (1937), 324, note 4; Edmund E.

saw and Casimir Dobrowolski of Cracow surveyed the subject in brief with great acumen of historical as well as philosophical analysis. Handelsman [11] laid stress on the action of exterior causes in forming nationalities and in carrying Europe forward from "provincial nationalities" to nationalities in the modern sense. Sometimes the collective name is first employed in common use by foreign neighbors (*Allemand, Welsh*, even *France*), or, again, by the Papacy, which from its distant center surveyed communities in a wider perspective, and therefore conceived them more definitely in their entirety. Thus *Gallia, Germania, Italia, Anglia* are unities for the Papal chancery long before their political unity had been formed. Moreover, Papal organization contributed much to consolidate the "provincial nationalities" on their way to greater formations. Institutions of public law, such as the kingship, representative of political unity, the Church, with its respect for nationality and its territorial organization, *etc.*, were also important factors in this evolution.

Professor Dobrowolski [12] concerned himself, above all, with the awakening and long evolution of national consciousness in Poland. He studied the formative factors, the ideological values that accompanied the rise of national sentiment (such as dynastic and religious myths, fatherland, and the nation's destiny), and the social functions of Polish national consciousness. He stressed in particular the conflicts of the Poles with the Germans in the era and in the

Stengel, in *Deutsches Archiv für Geschichte des Mittelalters,* II (1938), 300 f.; moreover, Finke, *Weltimperialismus und nationale Regungen im späteren Mittelalter* (Freiburg, 1916), p. 34 ff., and bibliography, p. 61 f., note 90; p. 62 f., note 96; James W. Thompson, *Feudal Germany,* Chapter XI, "The Sentiment of Europe toward the Germans in the Middle Ages", pp. 360-384; Heinz Zatschek, *Das Volksbewusstsein, sein Werden im Spiegel der Geschichtsschreibung* (Brünn, 1936), an interesting collection of expressions of national sentiment by and about different peoples, gathered from works of medieval historiography. It is characteristic that the problem of nationalism in the Middle Ages was not even touched on in earlier basic works such as Friedrich Meinecke, *Weltbürgertum und Nationalstaat,* fifth ed. (Munich, 1919), or Carlton J. H. Hayes, *Essays on Nationalism* (New York, 1926).

[11] Marcel Handelsman, "Le rôle de la nationalité dans l'histoire du Moyen Âge", in *Bulletin of the International Committee of Historical Sciences,* Vol. II, Part II, No. 7 (Paris, 1929), pp. 235-247.

[12] Casimir Dobrowolski, "Études sur la formation de la conscience nationale en Pologne au Moyen Âge", in *Bulletin of the International Committee of Historical Sciences,* Vol. X, Part II, No. 39, pp. 271-275.

areas of German colonization in the East (thirteenth and fourteenth centuries; Great and Little Poland, Kuyavia, and Silesia); and he attributes great importance to the wars, for instance, against the Teutonic Order, all being factors which strongly influenced the unification of the moral and physical forces within the Polish population. In the fourteenth and fifteenth centuries, they effected in Silesia the rise of a national sentiment separated from any allegiance to a definite State, an early and singular example of this phenomenon, of unforeseen importance.

The incipient sentiment of nationality in medieval Castile was studied from another angle by Professor Gifford Davis.[13] He examined the judgment of contemporary writers concerning the disposition of territory by the arbitrary will of their monarchs. Such comments show whether medieval Castilians considered their country as the personal property of the king or as a national possession entrusted to the crown, a distinction which legally existed, but in practice was disregarded by the kings in arbitrary alienations of territory and partitions of the realm. By the second half of the fourteenth century the danger of civil war, following such partitions, was attributed to certain loyalties clearly recognizable as national. Toward the opening of the modern period there existed in Castile a growing national consciousness.

Again from another angle, an inquiry into our problem was made by the distinguished British medievalist, Professor G. G. Coulton.[14] His view is universalistic; his aim is to give a general idea of the whole. So long as Europe had one Church and one learned language, the Latin, nationalism, it has been maintained, was suppressed. Coulton acknowledges that the action of Church and Latin, such as it was, certainly did tend against particularism. But he puts the question this way: "How far did they save Europe from that national feeling which narrows men's outlook and renders them unjust to other nations?" To find a satisfactory answer, he examines three important phases of medieval life: the Crusades, with the antagonisms among the participating nations and the lack of any more internationalistic atmosphere; the Universities, where the young students, coming from different countries and speaking

[13] Gifford Davis, "The Incipient Sentiment of Nationality in Mediaeval Castile: The *Patrimonio Real*", in *Speculum*, XII (1937), 351-358.

[14] G. G. Coulton, "Nationalism in the Middle Ages", in *The Cambridge Historical Journal*, V (1935), 15-40.

different languages, viewed one another with distrust and antipathy, which resulted in perpetual quarrels and fights; Monasticism, with much evidence of discord arising in the monasteries between representatives of various nationalities. All this is set forth by Coulton, in his well known attitude toward the Church, to confirm his two main theses: "When we face politics as a whole, religious as well as civil, the Church did not so much abolish militant nationalism as that she introduced the same thing, under another name"; and: "The participation by a small educated minority in one learned language was not likely to do so much for social and political harmony as modern civilization does, with its facilities for spreading the literature of one country over many others, and, still more, with its facilities for travel and personal intercourse."

If historical facts and developments are thus considered merely from a one-sided point of view, no complete picture of approximate historicity can possibly emerge. Even Coulton must admit that "the Church exercised unquestionably some real moderating influence wherever she herself was not a contending party."[15] And although he blames the "nationalized Papacy" for provoking even more definite nationalism in the States, his comprehensive last chapter reveals some of the true roots of medieval nationalism, from which a somewhat different picture might be derived. First place among his various examples from "international" law and politics take the ferocious and unceasing contentions among the Italian city-republics; the discriminatory laws of the fourteenth century which drew the most invidious distinctions between the English and Irish; the rising opposition to each other among those European nations who, up to the twelfth century, had consolidated from mere tribes into real nations; the English merchants' policies and those of the German *Hansa*, "fashioned on definitely nationalistic lines". Coulton finally arrives at some general conclusions which to a large extent deserve assent. The same process was going on, more or less, everywhere. On the one hand, nations were gaining that inner cohesion which is a natural step forward in civilization; on the other, there existed no central (secular) power to which men could confidently look for the reality of international justice.

[15] *Ibid.*, p. 29.

Another penetrating essay on the history of the awakening of national sentiment, by Erich Maschke,[16] treats of the contacts, contrasts, and mutual reactions of two peoples, Germans and Slavs, in the East-European regions of their first encounter. Although the sources under scrutiny in his study are of a very specific nature, the author arrives at conclusions of general interest and universal validity. He considers language and law as important factors in the process of the growth of national sentiment in the Middle Ages. This is particularly stimulated by the antagonisms originating from the encounter of two peoples. Mutual contrast is one root of all folk- and national consciousness. Difference in language, law, religion, and general character makes for a certain distance between two groups of peoples and cultures. It is felt in its full weight on both sides. Its intensity grows through meeting, not only in the course of political conflict but even in peaceful penetration, e. g., in the case of the German colonization in the European East. While thus the national contrasts are growing, at the same time the consciousness of one's own nationality develops all the more fully and quickly. Dynastic as well as religious motives ("national saints") heighten the effect of that development. This national self-consciousness, won already in the first half of the fourteenth century, to the same degree in Poland as in Bohemia, rose in the fifteenth century to a generalized hatred against the Germans. Does not the view of the *Sachsenspiegel* (*ca.* 1221-1224), III, 57, 2, that the king of Bohemia had to be excluded, as not being a German, from the electorate of the German king, imply a renunciation of Bohemia, and the recognition, scarcely voluntary, of the separate existence of a Bohemian realm? Only the contrast aroused reflection and permitted a consciousness of the national individualities.

It was such contrast and conflict that came also to the fore among the different national groups at the Councils of Vienne, 1311-1312, of Pisa, in 1409, and, five years later, at Constance. The "nations"

[16] Erich Maschke, *Das Erwachen des Nationalbewusstseins im deutsch-slavischen Grenzraum* (Leipzig, 1933), including a bibliography of older literature on the history of national consciousness in the Middle Ages, p. 51 ff.; cf. also *Bericht über die 18. Versammlung deutscher Historiker in Göttingen 1932* (Munich-Leipzig, 1933), pp. 12-15; Hans Rothfels, "Das Problem des Nationalismus im Osten", in *Deutschland und Polen, Beiträge zu ihren geschichtlichen Beziehungen*, ed. by Albert Brackmann (Munich-Berlin, 1933), p. 259 f.

became constituent parts of the Council, and the Council itself distinctly a federation of "nations": *concilium constituitur ex nacionibus*. Already in contemporary writings, references are found to current theories of corporate representation in matters of law, politics, *etc.*, and to the responsibilities of the "nations" at the Council of Constance to the greater nations at home. They also observed that at Constance the nations voted as did the corresponding nations in the medieval universities. No doubt there is a resemblance between the functioning of "nations" at the Church councils of the early fifteenth century and the familiar organization of the universities in the later Middle Ages. Little wonder, therefore, that both types of "nations" have especially been made the subject of research.[17] They are even considered to be the direct root of the concept, nation, in its modern meaning.

2. *Nationalism in International and Intranational Relations.*

Preceding chronologically as well as ideologically the modern manifestations of nationalism, a feeling of unity of the cultural background and of the future destiny, a realization of common bonds, developed — slowly yet early — in the Middle Ages in the various countries of Europe. There can be no doubt that language, law, and religion played an important role in this evolution. Already the assuming of a common name by a people betrays the first move toward a conscious national individualization.[18] In the

[17] Hugelmann, in *Historisches Jahrbuch,* LI (1931), 24-29; Heinrich Finke, "Die Nation in den spätmittelalterlichen allgemeinen Konzilien", *ibidem,* LVII (1937), 323-338; Louise R. Loomis, "Nationality at the Council of Constance", in *The American Historical Review,* XLIV (1939), 508-527; Hayes, "The Church and Nationalism", in *The Catholic Historical Review,* XXVIII (1942), 6-8.—On the attitude of the Papacy toward the rising nationalism, cf. Friedrich Bock, "Kaisertum, Kurie und Nationalstaat im Beginn des 14. Jahrhunderts", in *Römische Quartalschrift für christliche Altertumskunde und für Kirchengeschichte,* XLIV (1936), 105-122, 169-220. Karl Bierbach's *Kurie und nationale Staaten im früheren Mittelalter (bis 1245)* (Dresden, 1938) is not available in this country at present.—On the students' nations, see Hugelmann, *Historisches Jahrbuch,* LI (1931), 26 ff.; Hayes, *Essays on Nationalism* (*supra,* note 10), p. 4, note 1, both with bibliography; cf. also *infra,* note 41; in general, Hastings Rashdall, *The Universities of Europe in the Middle Ages,* ed. by F. M. Powicke and A. B. Emden, three vols. (Oxford, 1936), Vol. III, Index, *s. v.* Nations.

[18] Cf., e.g., for the genesis of the name *"Deutsch",* Eugen Rosenstock, "Unser Volksname Deutsch und die Aufhebung des Herzogtums Bayern", in *Mitteilungen der Schlesischen Gesellschaft für Volkskunde,* XXIX (1928), 58-

most obvious difference between peoples, namely a given language and the non-intelligibility of others, the conscious differentiation and the first conflicts begin to develop. A most impressive document fit to illustrate this is the charter by Duke Sobieslav II of Bohemia for the Germans in Prague (1176-1178), a confirmation of the privileges granted them by his grandfather Vratislav (1061-1092). In its introductory clause this fundamental proposition is laid down: [19]

> It is my pleasure that, since these Teutons are diverse in nation from the Bohemians, so they shall also be divided from the Bohemians and their law or custom.

Difference in language, disclosing difference of nationality, involves difference in law, and both lead of necessity to strong emphasis on the national differentiations and contrasts of the peoples involved.

The frontiers between different legal systems correspond to the differences in national origin. This is clearly visible in the East-European regions beyond the Elbe exposed to German colonization, namely, Silesia, Pomerania, the whole Polish Realm, Lithuania, Galicia, Volhynia, Podolia, Bohemia, Moravia, and Hungary.[20]

66. The word, *theodiscus* (*deutsch*), first occurs as early as 786 and was then applied to the language, not to the country or people; cf. James W. Thompson, *Feudal Germany,* p. 366, note 4.

[19] Wilhelm Weizsäcker, "Die älteste Urkunde der Prager Deutschen", in *Zeitschrift für sudetendeutsche Geschichte,* I (1937), 180: "...et placet michi, quod sicut iidem Theutonici sunt a Boemis nacione diversi, sic eciam a Boemis eorumque lege vel conswetudine sint divisi"; cf. also Maschke (*supra,* note 16), p. 17 f.

[20] Cf., e.g., Raimund Friedrich Kaindl, "Beiträge zur Geschichte des deutschen Rechts in Galizien", I, II, in *Archiv für österreichische Geschichte,* XCV (1906), 163 ff.; III-VIII, *ibidem,* XCVI (1907), 319 ff.; IX-XII, *ibidem,* C (1910), 311-492; Alfred Halban, *Zur Geschichte des deutschen Rechtes in Podolien, Wolhynien und der Ukraine* (Berlin, 1896); Richard Koebner, "Deutsches Recht und deutsche Kolonisation in den Piastenländern", in *Vierteljahrschrift für Sozial- und Wirtschaftsgeschichte,* XXV (1932), 313-352; R. F. Kaindl, "Studien zur Geschichte des deutschen Rechtes in Ungarn und dessen Nebenländern", in *Archiv für österreichische Geschichte,* XCVIII (1909), 383 ff.; Wilhelm Weizsäcker, "Der Einfluss des deutschen Rechts auf die böhmische Rechtsentwicklung", in *Mitteilungen des Vereins für Geschichte der Deutschen in Böhmen,* LXVI (1928), 3-18; G. Kisch, "Magdeburg Jury Court Decisions as Sources of Jewry-Law, A Study in Source History", in *Historia Judaica,* V (1943), 27 f., note 1, with bibliography; Karel Kadlec,

Here, the German settlers received the privilege to retain their native laws and were granted the full right of national autonomy.[21] Thus the German law on the one hand, and Slavic or Hungarian law on the other, were considered not only of different kind, but also appraised as of unequal value. The difference in their legal systems strongly reflected on the peoples and stressed their separateness. It was the realm of the law in which the sentiment of discrimination broke through first and provoked embittered hostility on the part of those who had no share in the privileged legal position of the foreign settlers. The differences in law, again, effected the actual and ideological division of the peoples. Even long after the initial national-legal demarcation had disappeared, the differences in law remained alive.[22]

While all this is well established by documentary evidence from German and Slavic sources, the role which the linguistic factor—as the key to the most essential characteristics of a people and its culture—played in the development toward consciousness of nationality has more recently been contested. Against the almost unanimous opinion of scholars attributing decisive importance in this process to language as the paramount object of contention, legal, social, and political,[23] the view has been put forward that only

Valaši a valašské právo v zemich slovanských a uherských [The Walachians and the Walachian Law in Slavic and Hungarian Countries; in Czech] (Prague, 1916).

[21] Cf. G. Kisch, *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte,* Germanistische Abteilung, XLVI (1926), 523 ff.

[22] Cf. Maschke (*supra,* note 16), pp. 17, 24, 27 f., 32 f.

[23] Cf. Maschke, *op. cit.,* pp. 4, 8, 11 ff., 18, 24, 33, 37 ff., 48, and *passim;* Brackmann (*supra,* note 8), p. 13; Domanovszky (note 10), p. 242; Meyers (note 10), p. 265; Dobrowolski (note 12), p. 273; Soldevila (note 10), p. 261; cf. Rosenstock (*supra,* note 18), pp. 48, 58, 60 f.; also Hayes, "Nationalism" (*supra,* note 1), p. 241; Boehm (note 2), p. 235; Hayes, *Essays on Nationalism* (note 10), pp. 13 ff., 31 ff., and *passim.*—Loomis (*supra,* note 17), p. 525, note 55, quotes the following noteworthy passage from the "Anglicae nationis... vindicatio sui juris quoad propriam nationem in concilio" [at Constance, 1414], from Hermann von der Hardt, *Magnum Oecumenicum Constantiense Concilium* (Frankfurt, 1700), Vol. V, p. 92: "sive sumatur natio ut gens secundum cognationem et collectionem ab alia distincta, sive secundum diversitatem linguarum, quae maximam et verissimam probant nationem et ipsius essentiam, jure divino pariter et humano..."—On language in its relation to the missionary activities of the medieval Church, see [Anonymous], "Studien zum Mythus des XX. Jahrhunderts" in *Amtsblatt des Bischöflichen Ordinariats Berlin,* Amtliche Beilage, third ed. (Cologne, 1935), pp. 43, 54 f.

nowadays the language question is the core of the problem of nationality, whereas it played a much lesser role in the Middle Ages.[24] "In the treatment of the tribes and the Jews, the tribal and folk law (*völkisches Recht*) play the greatest, dialect and language respectively, as much as no role at all."[25] Therein lies, it is contended, one of the fundamental differences between the medieval and the present-day conception of national problems.

Neither the reference to the German tribes nor that to the Jews can actually support that thesis. It is well known that, despite all similarity in language, the sentiment for the tribal dialect was always strong in Germany and persisted so, up to this very day. The differences of dialect accentuated and aggravated political resentments among the Germans themselves throughout their history. All the more so did the difference of language not only between the Germans and Slavic peoples, but also between Germans and Italians, Germans and French, Germans and English. The Crusades greatly stimulated both French and English national sentiment and developed an acute dislike for the Germans unknown before.[26] Though various popular traditions and feelings may have caused such friction, the linguistic factor itself contributed its share. The latter was non-operative, on the other hand, in the case of the Jews living in medieval Germany. For, a long time ago, they had given up Hebrew as their vernacular, they knew and employed the German language of their native provinces.[27] It was for this reason alone that considerations of language were in no way determinative in the German-Jewish relationship.

From what has been said this conclusion can be drawn: peoples' coming into mutual contact, peaceably or in hostile collision, and all the ensuing contrasts and conflicts, form in fact an important root of all folk sentiment and national feeling. To speak in modern terms, international contact awakened and strengthened national consciousness in the Middle Ages, just as in our own day.

[24] Hugelmann, in *Zeitschrift für Politik,* XIX (1930), 737 f.

[25] Hugelmann, in *Zeitschrift der Savigny-Stiftung,* German. Abt., LVIII (1938), p. 217; cf. Hugelmann, in *Historisches Jahrbuch,* LI (1931), p. 21 f.: "Aber trotzdem muss davor gewarnt werden, der Entstehung einer deutschen Schriftsprache für die Entstehung eines deutschen Nationalbewusstseins entscheidende Bedeutung beizumessen."

[26] For more details, see Thompson, *Feudal Germany,* pp. 373 ff.

[27] G. Kisch, *Sachsenspiegel and Bible* (Publications in Mediaeval Studies, Vol. V, Notre Dame, Ind., 1941), p. 176 ff.

Universalism in whatever shape counteracts or at least retards the break-through of nationalistic tendencies. Here is in truth a great achievement of the medieval universal Church and her universalist Canon law. In Eastern Europe there strove not Germans against Prussians, Latvians, Livonians, or Courlanders, but Christians against heathen. Christianity and Germanism form a unity held together by the bonds of the faith, not by those of nationality.[28] It is characteristic of the Church's aims that Innocent III in his call to Europe, in 1198, pointed out how the Crusades were suffering from the fact that "while our own princes . . . are pursuing each other with inexorable hatred . . . not one of them is moved by the injury to Christ crucified."[29] The Church, however, was successful in her endeavor only to some extent. True, the Papal decretals went into every country and the conciliar decrees had validity for the whole of Christendom. Church law thus was of an all-encompassing authority and, still more, was also introduced into secular legislation.

There were, however, forces of an opposite nature at work to counteract these universalistic trends. The failure of Latin in its unificatory tendency must be understood from this angle. To be sure, one cause was the fact that only a small educated minority participated in this language of the Church and the learned. This was not likely to produce a great effect. A counter-current of much greater force came soon into operation. In public life, the individual national languages won out against Latin at a comparatively early date. In Germany this was accomplished in the course of the thirteenth and fourteenth centuries. In the middle of the thirteenth century, German replaced Latin in legal instruments in the countries on the Rhine and Danube. Frederick II's *Constitutio Moguntina* of 1235 was the first imperial law to be published in German as well as in Latin. It is significant that the Teutonic Order was foremost in using German in legal and administrative documents, while the chanceries of the ecclesiastical princes far longer clung to Latin.[30] The secular literature of *Minnegesang*, the homiletic liter-

[28] Cf. Maschke, *op. cit.*, p. 40 f.

[29] Quoted from Baronius' *Annales*, 1198, § 81, by Coulton (*supra*, note 14), p. 19.—Despite her universalistic character the Church had, obviously, to give consideration also to the national element in certain branches of administration; on this subject, see Finke, *Historisches Jahrbuch*, LVII (1937), 325 f.

[30] Cf. Erich Keyser, "Lateinische und deutsche Verwaltungssprache im Deutschen Ordenslande", in *Mitteilungen des Westpreussischen Geschichtsvereins*, XXVII (1928), 74-78.

ature of the Church, the legal literature of the law-books, the historical literature of the chronicles, all written in German, arose almost simultaneously and partly even reached a peak in the thirteenth century. Eike von Repgow, the author of the most outstanding medieval German law-book (*ca.* 1180-1233), according to his own report, translated his *Sachsenspiegel* from his original Latin into German, about 1221-1224. He was the first to coin a German legal language and to produce a trustworthy account of contemporary German (Saxon) law.[31] It would appear as if all the national forces in the domain of law had gathered before the overpowering inroads of Roman law to follow in the consecutive centuries.[32] The problem of whether the adoption and continuation of the idea of the Roman Empire should be considered as one of the sources of opposition to national currents must remain an open question for the time being.

The national consolidation in the field of law, noteworthy in itself, reveals, moreover, a phenomenon which has a particular bearing on the history of nationalism. It is a fact that language and laws of what modern terminology would call "minorities" (national as well as religious) were given thoughtful consideration and equitable regard within the realm of the national law. Remainders of traditional ill-feeling of a nationalistic nature sometimes still broke through. However, the nationalistic conflicts, born of international antagonisms, had lost their magnitude in the purely national atmosphere. Justice now exercised its tempering influence. Thus it becomes understandable that, according to the *Sachsenspiegel* (Landrecht, III, 70, 71) the use of a non-German language and of foreign law was not only permitted on German soil, but even prescribed to a certain extent. This applies to the language, law, and jurisdiction of the Wendish Slavs,[33] whose region of settlement one time ex-

[31] G. Kisch, *Sachsenspiegel and Bible,* p. 3 ff.—The general effect of all the developments described here and their relationship to the rise of national sentiment are far underestimated by Hugelmann, *Historisches Jahrbuch,* LI (1931), 21 f.

[32] On the so-called "reception" of Roman law in Germany, see Georg von Below, *Die Ursachen der Rezeption des Römischen Rechts in Deutschland* (Munich-Berlin, 1905); cf. Woldemar Engelmann, *Die Wiedergeburt der Rechtskultur in Italien durch die wissenschaftliche Lehre* (Leipzig, 1938).

[33] Cf. Ernst Hoyer, "Das Sprachenrecht des Sachsenspiegels", in *Jahrbuch des Vereins für Geschichte der Deutschen in Böhmen,* II (Prague, 1929), 21 ff.; Hugelmann, "Die Rechtsstellung der Wenden im deutschen Mittelalter",

tended westward to the Elbe and the Saale rivers, whose political independence ended, however, in the course of the thirteenth century. As far as the law was concerned, no Wend was to suffer any wrong from the fact that he could speak only his mother tongue. Thus no tendency is visible on the part of the victorious people of annihilating the conquered people or even of depriving it of its own law, language, and culture. It may be appropriate in this connection also to mention the fact that Jewish law was recognized in medieval Germany within certain limits,[34] although the legal situation of the Jews differed considerably from that of the Wends.

But the legal policy was not to perpetuate national differences within a national body. According to *Sachsenspiegel*, III, 71, 2, once a Wend had sued, responded, or rendered decision in the German language, he forfeited his right to employ his Wendish language in court. This means that, notwithstanding all toleration, tacit or explicit, the legal policy tended toward the national assimilation of originally foreign elements. In the case of the Wends such assimilation was in fact accomplished.

The realm of law is, however, only one outlet for a people's national self-expression. As history often shows, extra-legal factors sometimes gain influence and divert the trend of evolution. The overwhelming factor which came into play in medieval Central Europe was of religious character. It was not the Church, but the pre-Reformation movements, Wiclifite and Hussite in particular, that stirred up national sentiments, apart from international antagonisms.[35] The secularization of the intellectual and social rela-

in *Zeitschrift der Savigny-Stiftung*, German. Abt., LVIII (1938), 225 ff.; Maschke, *op. cit.*, p. 18 f.—In contrast to his own thesis that language was of lesser importance for the rise of medieval national sentiment, Hugelmann makes an exception in the case of the Wends. He places much emphasis on the linguistic element, in his last-mentioned essay. This is correct indeed and entirely in accord with the law sources.

[34] Cf. G. Kisch, *Jewry-Law in Medieval Germany in the Light of Law-Books and Court Decisions* (to be published soon).

[35] Beside many other things, Huss was reproached with deepening in his preaching the contrasts between Czechs and Germans, and inciting the Czechs against the Germans. These charges Huss denied repeatedly and, above all, repudiated that he had been the cause of the exodus of the Germans from the University of Prague. Also, he asserted, he had nowise fomented conflict between the two peoples by his sermons. Zatschek, *Das Volksbewusstsein* (*supra*, note 10), p. 29 f.

tions through Humanism and the beginnings of nationally established churches worked together.[36]

These developments naturally could not remain without deep impress on the Church. Her universalistic aims underwent no change. But for this very reason she had soon to face the impact of the two concepts, nationalism and universalism. Both ideologies wrestled with one another at the Council of Constance.[37] The Italians and the English were the first to exhibit national feelings and to consider themselves as "nations".[38] Sharp attacks on the national system were, however, not lacking. Church councils should not be divided into nations representing kingdoms, for "such a mode of division is secular rather than ecclesiastical and foments disputes over superiority or priority." They should be divided on ecclesiastical principles.[39] Cardinal D'Ailly, who propounded this opinion, succumbed however to an overwhelming opposition. Although no documentary evidence testifies to any interference by Emperor Sigismund, still it is certain that he was in favor of that innovation.[40] Questions of language and law, again, played an important role in Constance. The symptoms of a new nationalism struggled into the foreground. One does well to call to mind that, only a few years earlier, a similar situation had arisen among the various "nations" at the University of Prague and led there to a complete break and to national separation.[41] In Prague (1409) and in Constance (1414-1418), medieval national consciousness was transformed into modern political nationalism.[42]

[36] Cf. Maschke, *op. cit.*, p. 39.

[37] See above all, the essays by Heinrich Finke and Louise R. Loomis, cited *supra*, note 17.

[38] Cf. Finke, *op. cit.*, p. 329, note 12; Loomis, p. 513.

[39] Quoted by Loomis, p. 518, from Cardinal D'Ailly's *Canones reformandi ecclesiam*, in Hardt (*supra*, note 23), I, 409-433.

[40] Cf. Finke, p. 332; Loomis, p. 520 ff.

[41] Friedrich Matthaesius, "Der Auszug der deutschen Studenten aus Prag 1409", in *Mitteilungen des Vereins für Geschichte der Deutschen in Böhmen*, LII (1914), 451-499; LIII (1915), 58-110.

[42] If the evolution as outlined in this essay has been seen correctly, it offers a rectification of the following statement by C. J. H. Hayes in *Encyclopaedia of the Social Sciences*, XI, 241: "The fact remains that it [i.e. historic nationalism] was more spasmodic and less commanding."

3. *Race and Law in Medieval Germany.*

To the best of this writer's knowledge, the problem of "Race in the Middle Ages" has received no extensive discussion or even serious consideration in the voluminous literature on race and race conflict.[43] None of the previously mentioned authors concerned with medieval nationalism raised this question at all. Only sporadically, in modern works of Sociology, reference is found to racial relations in medieval society.[44] In the Middle Ages, it is held, there was scarcely any real race antipathy between Nordics and Arabs. Brotherhoods were often established between Christian and Arab knights, there were marriages even between the princely houses, and the thought found utterance that all men were brothers. All this, however, does not amount to more than to some incidental observations and merely superficial remarks. The reasons are obvious. They lay in the nature of the subject. While the concepts of nationality and nationalism come to the fore in medieval sources in one form or another, there is hardly room for some expression of "race relations" (in the refined present-day meaning of the term) apart from national or political divergencies. Internationally, the Crusades brought Europe into contact with various Moslem and Arab peoples. Within the boundaries of the Roman Empire of the German Nation, however, there were only two "minorities" of possibly "racial" difference from the general populace: the remnants of the conquered Wendish Slavs and the Jews.

Speaking in modern terms, there can be no doubt about the racial distinction between the Wendish Slavs and the Saxon Germans. Their ancient political and national antagonism found mention as late as in Johann von Buch's Commentary on the *Sachsenspiegel* (about 1325), as an historical reminiscence.[45] There is, however,

[43] Cf. the bibliographies in *Encyclopedia of the Social Sciences,* XIII (1937), 35 f., 41.—The only monograph on the subject known to this writer, Herbert Meyer's *Rasse und Recht bei den Germanen und Indogermanen* (Weimar, 1937), is devoted to theories on the historical origin of the Germanic race and ancient forms of Germanic legal institutions. It is based on National-Socialist ideology.

[44] Cf., e.g., Friedrich Hertz, *Race and Civilization* (London-New York, 1928), pp. 67, 69, 73, note 54.

[45] Buch's Commentary on *Sachsenspiegel,* III, 70, 1, offers this historical explanation for the difference before the law between Saxons and Wends: "Diss

no other trace in legal sources of any enmity between Wends and Saxons on purely racial grounds. Reliable evidence for just the opposite mutual attitude is found in the gradual assimilation of the Wends to, and their absorption by, the Germans in whose midst they lived. The Wendish inhabitants of German cities, little by little, were endowed with rights equal to those of the German burghers. In the thirteenth century there were in Stendal two *consules*, and in the period from 1175-1338 in Lübeck thirteen councilmen, of undoubtedly Wendish stock.[46] Wendish ancestry thus was by no means an obstacle to the rise to a socially higher group, although—according to *Sachsenspiegel*, III, 70, 1—the Wend was not considered eligible for passing judgment on, or bearing witness against, any one equally with Saxons, Franks, or even Jews. True, as late as the fifteenth and sixteenth centuries, some guilds required for admission to membership evidence that the candidates were " of genuine German and not of Wendish *Art*." But even protagonists of the race theory concede that in this case the restriction on the part of the craftsmen guilds was due only to considerations of the competitive struggle, not of racial enmity.[47] A Magdeburg lawbook of the middle of the fourteenth century, characteristically, speaks of two parties to a law suit " both of whom are of Wendish ancestry (*Art*) yet who are no Wends." [48] Here the process of assimilation seems to be fully completed. Little wonder therefore that, at the end of the fourteenth, and in the first half of the fif-

ist darumb, das sie von alters her unter einander sind feinde gewesen ... Und solchs ist di ursach, das ihr keiner uber den andern urtel finden mag. Dann niemandt mag uber seinen feind oder schwerdtgenossen urtel finden; " *Sachsenspiegel*, ed. by Christoff Zobel (Leipzig, 1560), fol. 446 a; cf. Maschke (*supra*, note 16), p. 18; Hugelmann, " Die Rechtsstellung der Wenden im Deutschen Mittelalter " (*supra*, note 1), pp. 251, 255.

[46] Hugelmann, *op. cit.*, p. 223.

[47] Hugelmann, *op. cit.*, p. 223 f.—This interpretation is applicable also to the similar restrictions of admission to guilds in late medieval Spain, as comes clearly to light from the presentation by Julius Klein, " Medieval Spanish Guilds ", in *Facts and Factors in Economic History, Articles by Former Students of Francis Gray* (Cambridge, Mass., 1932), p. 179, note 3, p. 183 f.

[48] Paul Laband, *Das Magdeburg-Breslauer systematische Schöffenrecht aus der Mitte des XIV. Jahrhunderts* (Berlin, 1863), III, 1, 4, p. 55: " Ab sich czwene undir en andir wundin bynnyn weichbilde unde beyde von windischer art sint her komyn unde doch nicht wendin sint, ..."

teenth century, usage of the Wendish language in court, formerly guaranteed by law, was finally abolished.[49]

The legal status of the Jews as compared with that of the Wends shows similarities as well as dissimilarities. Both Wends and Jews had no definite territory of their own, no closed region of settlement within medieval Germany. While the Wendish language found consideration at law to some extent, Hebrew is not mentioned as the language of the Jews, which indeed it was not, at least in their intercourse with Christians.[50] Jews are not excluded from passing judgment on, or bearing witness against, any one (according to *Sachsenspiegel,* III, 70, 1), while Wends were restricted in this regard. Wendish law and custom were respected to some extent, and the same principle applied to Jewish law as well. The most conspicuous difference of a basic nature between the two groups was in religion. The Wends were Christians, the Jews had remained outside of the Church. The contrast between the Jews and the Christian world was based foremost on religious grounds. While the mutual Germanic-Slavic hatred was rooted in nationalistic feelings, no similar motivation can be inferred from medieval sources with regard to the Jews.[51] According to medieval German poetry (Freidank, Walther von der Vogelweide) God had created men, Christians as well as Jews and pagans, and was worshipped by all of them. The Jews who lived before Jesus had been very dear to Him. Even the contemporary Jews were, in this literature, called nothing worse than condemned, evil, unfortunate, unbelieving, or unfaithful Jews, with reference to their religious position.[52] No

[49] Hugelmann, *op. cit.,* p. 237.—On the gradual assimilation of non-Hungarian "minorities" in medieval Hungary, cf. Elemir Mályusz, "Le problème de l'assimilation au moyen âge", in *Nouvelle Revue de Hongrie,* XXXIV (April, 1941), 291-301.

[50] Cf. *supra,* note 27.

[51] Cf. Guido Kisch, "The Jewry-Law of the Mediaeval German Law-Books", I, in *Proceedings of the American Academy for Jewish Research,* VII (1935-36), 126 ff., 133; G. Kisch, "Jewry-Law in Central Europe—Past and Present", in *Journal of Central European Affairs,* II (1943), 402 f.

[52] Cf. Siegfried Stein, *Die Ungläubigen in der mittelhochdeutschen Literatur von 1050 bis 1250,* University of Heidelberg Ph.D. Thesis (Berlin, 1933), pp. 13, 17, 22, 24, 34, 93. On the meaning of the term *perfidia Judaica* in Nicolas de Lyra (1270-1349), cf. Herman Hailperin, "The Hebrew Heritage of Mediaeval Christian Biblical Scholarship", in *Historia Judaica,* V (1943), no. 2, text

mention is made of their difference in character, national or racial. In the view of the Middle Ages, the religious distinction was the dominating factor that determined the political and legal situation of the Jews. Other factors which, at times, came to play a more or less important role, can remain outside of this consideration.

Prior to 1933, modern research in the history of law recognized religious difference as the main motivation for the particular legal status of the Jews in the Middle Ages. Another theory regarded medieval Jewry-law as an outgrowth of Germanic "Alien-Law", thus emphasizing the religious and national otherness of the Jews.[53] An interpretation in racial terms, though sporadically met with,[54] could not prevail.[55] Only recently the claim has been made that

after note 37. It is conspicuous that the expression "Jew" as a term of abuse is not found in medieval German law sources; cf. Rudolf His, *Das Strafrecht des deutschen Mittelalters,* II (Weimar, 1935), 107 ff.

[53] On the *status causae et controversiae,* see G. Kisch, "The Jewry-Law of the Medieval German Law-Books", I, 64 f. and note 6, with full bibliographical references. Repeatedly the hypothesis of the medieval Jew as "an alien without a motherland" has been advanced; cf. Hans von Frisch, *Das Fremdenrecht, die staatsrechtliche Stellung der Fremden* (Berlin, 1910), p. 43: "Erstere [the Jews] waren tatsächlich heimatlos; sie hatten kein Territorium, in das sie zurückkehren konnten und keine Staatsgewalt, die sie unter Umständen in der Fremde schützte;" somewhat differently, Salo W. Baron, "The Jewish Factor in Mediaeval Civilization", in *Proceedings of the American Academy for Jewish Research,* XII (1942), 36. Such conceptions extend to the Middle Ages modern forms of legal constructions which have no foundation in concept or phrasing of the medieval sources.

[54] Cf. Friedrich Wiegand, "Agobard von Lyon und die Judenfrage", separate edition from *Festschrift der Universität Erlangen zur Feier des achtzigsten Geburtstages des Prinzregenten Luitpold von Bayern* (Erlangen, 1901), pp. 9, 31; Emanuel Forchhammer, "Beiträge zur Geschichte der deutschen Juden mit besonderer Beziehung auf Magdeburg und die benachbarte Gegend", in *Geschichtsblätter für Stadt und Land Magdeburg,* XLVI (1911), 122 f., 150; Hugelmann, *Historisches Jahrbuch,* XLVIII (1928), pp. 565 ff., *passim;* Karl Frölich, *Zeitschrift der Savigny-Stiftung,* German Abt., LII (1932), p. 428.

[55] Cf. Karl von Amira, *Grundriss des germanischen Rechts,* third ed. (Strassburg, 1913), p. 140: "Den Juden wies nach südgermanischen Rechten weniger die Rasse als die Religion eine Sonderstellung an"; Johannes Nohl, *Der schwarze Tod, eine Chronik der Pest 1348-1720* (Potsdam, 1924), p. 252 f. Even an author such as Max Hildebert Boehm wrote, prior to 1933, *Encyclopaedia of the Social Sciences,* XI, p. 236: "Whereas the antisemitism of the Middle Ages was grounded on a religious basis and was appeased by the conversion of the Jews, the racial or nationalistic antisemitism of today passionately opposes change of faith as mimicry."

the modern concept of race was already known to the Middle Ages, that the antithesis of races was recognized then, and that besides religious and economic causes, one must look for the element of racial distinction as an important reason for the special legal treatment of the Jews, particularly at the close of the Middle Ages.[56] No unambiguous proof for this assertion has been brought forward as yet from the wide domain of medieval legislation or judicial practice. Therefore it seems appropriate to give a few striking examples of contrary evidence.

First, one can easily find a parallel, in the legal history of the Jews, to the social and legal promotion of the Wends through appointments to city councils. In the thirteenth and fourteenth centuries Jews were granted citizenship in Worms (and probably in other German cities too) under almost the same conditions and forms as Christians.[57] No racial discrimination is observable.

The *Schwabenspiegel*, a South-German law-book composed about 1275, in which the influence of Canon law was most pronounced, assigns the penalty of death by fire for Christians and Jews convicted of mutual sex relations.[58] Is this perhaps a medieval regulation

[56] Wilhelm Grau, *Antisemitismus im späten Mittelalter: Das Ende der Regensburger Judengemeinde 1450-1519*, University of Munich Ph.D. Thesis (Munich, 1934), pp. 134-137; Herbert Meyer, "Das Hehlerrecht der Juden und Lombarden", in *Forschungen zur Judenfrage*, I (Hamburg, 1937), 92-109; H. Meyer, "Das jüdische Hehlerrecht", in *Deutsche Rechtswissenschaft*, II (1937), 97-111 (for criticism, see G. Kisch, *Historia Judaica*, I [1938], 3-30); Rudolf Ruth, "Wucher und Wucherrecht der Juden im Mittelalter", in *Deutsche Rechtswissenschaft*, II (1937), 111-157 (criticism by G. Kisch, *ibid.*, pp. 66-72); Günther Franz, "Der Jude im katholischen Kirchenrecht", in *Deutsche Rechtswissenschaft*, II (1937), 157-166 (criticism, G. Kisch, *loc. cit.*); George A. Löning, "Juden im mittelalterlichen Bremen und Oldenburg", in *Zeitschrift der Savigny-Stiftung*, German. Abt., LVIII (1938), 270 f. Cf. also G. Kisch, *Historia Judaica*, IV (1942), 102 f.

[57] G. Kisch, "Die Rechtsstellung der Wormser Juden im Mittelalter", in *Zeitschrift für die Geschichte der Juden in Deutschland*, V (1934), 126 ff. This fact was recognized even by Ruth (*supra*, note 56), p. 142, note 1.

[58] *Schwabenspiegel*, ed. F. L. A. von Lassberg (Tübingen, 1840), art. 322; ed. Heinrich Gottfried Gengler (Erlangen, 1875), art. 272:

> Und ist daz ein cristen man bi einer judinne lit, oder ein jude bi einem cristen wibe, diu sint beidiu des überhures schuldic, und man sol si beidiu über einander legen, und sol si verbrennen, wan der man hat cristen gelouben verlougnet.

Cf. G. Kisch, "The Jews in Mediaeval Law", in *Essays on Antisemitism*, ed. by K. S. Pinson (New York, 1942), p. 63 f.

against "race defilement"? The *Schwabenspiegel* itself answers the question unmistakably through its juridical qualification of the crime as "denial of the Christian faith," namely, heresy or unbelief (*ungelouben*) in the case of the Christian. Sexual relations of whatever nature between Christians and Jews were considered by the secular law to be cases of heresy. Hence, the severe penalty imposed on the Christian offender and *per analogiam* extended also to the Jew. Considerations of a religious nature alone are here in play.[59] Of racial ideas not the slightest trace is discoverable. It was already Saint Ambrose who in disapproving of marriages of Christians with gentiles, Jews, or foreign born, i.e., heretics, emphasized: "*Primum in conjugio religio quaeritur.*" [60]

Nor does another fact permit an interpretation in racial terms. In medieval law sources converts from Judaism are, as a rule, explicitly designated as former adherents of the Jewish faith. Partly

[59] In this connection the argumentation on the problem of an outstanding lawyer at the Papal court in Avignon may be of interest: Oldradus de Ponte (de Laude), *advocatus consistorialis, fl.* 1302-1335; cf. Friedrich Carl von Savigny, *Geschichte des Römischen Rechts im Mittelalter,* second ed., Vol. VI (Heidelberg, 1850), pp. 55-59; Ed. Will, *Die Gutachten des Oldradus de Ponte zum Prozess Heinrichs VII gegen Robert von Neapel* (Leipzig, 1917), pp. 3-9. Oldradus de Ponte, *Consilia* (Romae, 1478), no. 333: "Qualiter puniatur iudeus cognoscens carnaliter christianam. Fateri quidem oportet, prohibitum esse iudeum christiane coniungi, quia cum matrimonium sit communicatio divini iuris ... hoc autem cum non sit, constat matrimonium non esse ... et talis contrahens tanquam adulter puniretur ... sed de alia commixtione iudei cum christiana licet sit prohibita extra non occurrit ius expressum dicens eum tanquam adulterum puniri. Et si forte diceretur arguendo quod, si puniretur talis commixtio sub velamine matrimonii commissa, ut supra dictum est, fortius sine velamine tali, ut *ff. de adul. si adulterium cum incestu* [*Dig.,* 48, 5, 39 (38)]. Sed hec multum non cogit. Primo quia commixtionem illicitam committit et *matrimonii sacramento iniuriam facit, C. ne sacrum bapt. rei l.* 1 [*Cod. Just.* 1, 6, 1] ..."

[60] St. Ambrose, *De Abraham,* liber primus, c. 9, Migne, *Patrologia Latina,* XIV, 473 C, D:

> Et ideo cave, Christiane, gentili aut Judaeo filiam tuam tradere. Cave, inquam, gentilem aut judaeam atque alienigenam, hoc est, haereticam et omnem alienam a fide tua uxorem arcessas tibi . . . Primum ergo in conjugio religio quaeritur.

On the social significance of the *impedimentum disparitatis cultus,* cf. Hans Liermann, "Rasse und Recht", in *Zeitschrift für die gesamte Staatswissenschaft,* LXXXV (1928), 292 f.

this was done in order to call special attention to their merit in embracing Christianity. Partly, however, it was done also for reasons of caution, since the religious trustworthiness of proselytes never remained above suspicion.[61] None of this has any connection with, or implication of, racial origin.

It was exactly the same suspicion of infidelity in matters of faith which was raised against recent converts of more or less dubious sincerity in Spain after 1391 and through the fifteenth century. Their conversion, it was held, was ineffective. For these converts remained at heart deeply attached to the ideals of their former brethren in faith; baptism had not affected these *marranos* spiritually.[62] To draw from this the conclusion that "the prejudice which had previously been ostensibly religious became 'racial'," [63] means indeed reading modern racist conceptions into medieval sources where no justification can be found for such interpretation. It cannot be denied, namely, that proof of crime, i.e., of infidelity to Christianity, was considered essential. It was for this reason that the document known as *Sentencia Estatuto*, issued by the city of Toledo on June 5, 1449, and excluding *conversos* as being Jews at heart from holding public office and bearing witness against Old Christians,[64] referred to religious causes, namely to a *Pesquisa* containing a list of no less than twenty-five transgressions against the Christian religion, with which the Neo-Christians were charged.[65] That such a policy in fifteenth-century Spain and particularly in Portugal necessarily led to results practically corresponding to those aimed at by modern racial legislations,[66] is a different story. Even

[61] For documentary evidence covering one and a half centuries, see G. Kisch, "The Jewry-Law of the Mediaeval German Law-Books" (*supra*, note 51), I, 127 f., note 135.

[62] Cecil Roth, "Marranos and Racial Antisemitism", in *Jewish Social Studies*, II (1940), 241-243.

[63] So Roth, *ibid.*, p. 243, faithfully leaning on Henry Charles Lea, *A History of the Inquisition of Spain*, I (New York, 1906), 126: "Thus the hatred which of old had been merely a matter of religion had become a matter of race."

[64] The text is published by Fritz Baer, *Die Juden im christlichen Spanien*, I, 2 (Berlin, 1936), no. 302, p. 315 ff.; cf. Lea, *A History of the Inquisition of Spain*, I, 126 f.; Roth, *op. cit.*, p. 244 f.

[65] See the text and its history in Baer, *op. cit.*, no. 302, p. 318 f.

[66] It should not escape the reader's attention that, all similarities notwithstanding, there are still differences observable. E.g., voluntary converts of the periods prior to 1391 (Jews) and to the enforced baptisms of the early sixteenth

then the Church at least did not think in terms of racism and did not approve of the actual results, rather maintained her doctrine of the sacramental character of baptism, which confers equal membership in the Church. In fact, on September 5, 1449, Pope Nicholas V issued a bull declaring that all the faithful are one, and, that the laws admitting converts to all the privileges of Christians were to be enforced. In 1450 the Pope formally excommunicated the authors of the *Sentencia Estatuto* which, in addition, was one year later condemned by the synods of Vittoria and Alcalá de Henares. Alfonso de Montalvo, the foremost jurist of the time, pronounced it to be illegal. The bull of 1449 was reiterated in 1451.[67]

All this is completely in line with a decision issued almost three hundred years before by Pope Alexander III to the Bishop of Tournay (1167-1181) and incorporated in the *Corpus Juris Canonici*.[68] A prebend seeker of Jewish descent rejected by the local bishop appealed successfully to the Papal throne. "You shall not lower him because of his Jewish descent," read the Papal decision.[69] It is clear that even the Bishop of Tournay was prompted rather by reasons of mistrust against a convert candidate for an ecclesiastical office than by racial discrimination.

century (Moors) were accepted as Old Christians, Lea, *A History of the Inquisition in Spain*, II, 298; *limpieza de sangre*, or purity of blood, referred to admixture of Jewish or Moorish or *heretic* strain, Lea, *op. cit.*, II, 251.

[67] Lea, *op. cit.*, I, 127; Roth, *op. cit.*, p. 244 f.

[68] C. 7, X, *de rescriptis*, I, 3:

> ...mandatum dedimus et praeceptum, ut dilectum filium nostrum P. praesentium latorem, qui de gente Judaeorum originem duxit, et divina gratia fidem Christi humiliter et devote suscepit...in canonicum reciperent et praebendam...sibi conferre deberent...Pro eo vero, quod Judaeus extiterit, ipsum dedignari non debes.

Cf. G. Kisch, "The Jewry-Law of the Mediaeval German Law-Books," I, 128, note 135.

[69] A different stand, however, was taken in 1611 by the Roman Inquisition:

> Ex Judaeorum progenie descendentes non admittantur ad canonicatus in cathedralibus, dignitates in collegiatis et beneficia curam animarum habentia, nec etiam ad munus vicarii vel curae etiam amovibilis, quod servetur etiam a regularibus in ecclesiis, in quibus habent curam animarum; ad ordinationes vero non promoveant, nisi viros probatae vitae et eos, quibus merita suffragantur.

Moritz Stern, *Urkundliche Beiträge über die Stellung der Päpste zu den Juden*, I (Kiel, 1893), no. 161, p. 176 (41).

Considerations of race were of necessity incompatible with the universalist concept of the Church. They were decidedly antithetical to the Christian religion and to the constant teaching of the Church.

As is well known, medieval secular law was greatly conditioned by the Christian *Weltanschauung*. Its legal philosophy was anchored in Christianity. *Sachsenspiegel* law, for centuries dominant in Central Europe, and influential even beyond its boundaries, represents a good example. The concept that God is the source and limit of all law permeates the *Sachsenspiegel*. Its entire legal system is subordinated to the one great idea of God. Even the old good law inherited from the forefathers can maintain itself only in so far as it does not conflict with Christian law and Christian faith (I, 18, 3).[70] When modern sociologists hold that States were founded upon conquest and migration, and that in organizing society the conquering race constituted itself the ruling class, while the conquered were relegated to servile status, race therefore becoming a factor of social superiority,—this doctrine with all its implications was not unknown to the author of the *Sachsenspiegel*. To be sure, his train of thought did not follow the path of racial theory. He rejected indeed unmistakably the essence of that doctrine: servitude to him is unlawful. It has its source in might and not in right. It originated in capture, in captivity, in the unrighteous exercise of power. Despite such an origin, servitude became custom. But it remained unrighteous custom and therefore unlawful. For it contradicted the concept of the divine nature of law and of the divine likeness of man. A victor may have a State rise on the basis of his power, but he cannot rightfully deprive a human being of freedom. The boundary line for freedom drawn by God may not be passed.[71]

The racial concept and doctrine have no foundation in medieval law, either ecclesiastical or secular.

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[70] "Dar zû behilden se al ir alde recht, wâr iz weder der kristlicher ê unde weder deme gelouben nicht ne was"; G. Kisch, *Sachsenspiegel and Bible*, pp. 122, 124.

[71] G. Kisch, *Sachsenspiegel and Bible*, p. 144 f.

ROMAN LAW AND THE POLISH JURISTS

From the Later Middle Ages to the Partition of Poland *

THE recorded beginnings of Polish history are marked by a close contact with the medieval Western world, i.e., with Latin civilization and Roman Law. In this respect, the Poles are different from some other Slavic nations, such as Russians, Serbians and Bulgarians, who, since their entrance on the stage of European history between the eighth and the tenth century, came within the sphere of the Eastern Church and of the Byzantine Empire. The Poles, like the Czechs (in their early history), the Slovaks and Croatians, developed their national life and State under the guidance of the Roman Catholic Church, in a close, although not always friendly contact with the Holy Roman Empire and the Germanic elements of medieval Europe.

The first Polish chronicles, by Gall,[1] Kadłubek[2] and Długosz,[3] were written in Latin. They evince the familiarity of their respective authors with Roman Law and contain direct references to this Law.[4] The use of Latin for all official purposes, in the compilation

* Paper read at the meeting of the Riccobono Seminar of Roman Law in America, Washington, D. C., January 28, 1943.—The author expresses his deep appreciation to the editors of Seminar for their generous help in preparing the manuscript for the press.

[1] *Galli anonymi chronicon* covers the beginnings of Polish history, up to 1113. It was written about that date but edited for the first time by Finkel (Lwów, 1899). Cf. Kutrzeba, *Historja źródeł dawnego prawa polskiego* (Lwów, 1925), I, 12; 21.

[2] Vincent Kadłubek (*Vincentius Cadlubconis*), bishop of Cracow, 1202-1218, brought Polish history up to 1202; Kutrzeba, *op. cit.*, I, 13.

[3] Jan Długosz, canon of Cracow, brought Polish history up to 1480, the year of his death. His chronicle was first printed in excerpts, in Dobromił, 1614 and 1615. The complete text appeared in Leipzig, 1711-1712. It was reprinted in *Opera omnia Joannis Długosz* (Kraków, 1873-1878), vols. X-XIV; the Polish translation is found in vols. II-VI. Cf. Kutrzeba, *op. cit.*, I, 19; 21.

[4] For passages in Gall, see Bandtkie, *Historya prawa polskiego* (Warszawa, 1853), e.g., p. 245: *legibus romanis inhibitum;* or p. 242: *jus civile.* Passages from Kadłubek were collected in Iwanowski, *Investigentur omnes sententiones*

of legal documents and of royal decrees (*statuta* and *privilegia*), precedes the use of Polish and even antedates the formation of the Polish literary language which emerged out of the local dialects in the late fourteenth and the early fifteenth century. Bare traces of early Polish were preserved in the localisms which found their way into the text of Latin documents of the twelfth and thirteenth centuries.[5] Latin was used in the courts of justice and, to a certain extent, in parliamentary proceedings up to the late eighteenth century.

But although Poland arose and grew in an atmosphere permeated with Roman Law, utterances of Polish statesmen and jurists during the period from the fourteenth to the eighteenth century show sharp differences of opinion as to the role of Roman Law and disclose, generally, a marked discord in their attitude toward Roman Law. A similar controversy is to be found among the nineteenth century scholars of Polish legal history. In 1801, Tadeusz Czacki, in his learned study of Polish and Lithuanian Law, raised the problem of the role of Roman Law in Poland and denied to it any authority whatsoever.[6] This brought about a vivacious and passion-

et loci juris romani quotquot in Cadlubcone occurrunt et indicentur fontes eorum (Varsaviae, 1827), *passim*. Passages in Długosz are to be found in Bandtkie, *op. cit.*, p. 246, and in the admirable study on Roman Law in Slavic countries, a masterpiece of scholarly insight and documentation, by the eminent Polish historian of Law, Romuald Hube, "*Polska*", *O znaczeniu prawa rzymskiego i rzymsko-byzantyńskiego u narodów słowiańskich* (Warszawa, 1868), p. 50, n. 3. It was reprinted in his *Pisma* (Warszawa, 1905), I, 373-387.

[5] The earliest dated Latin MS with Polish words inserted is the *Bulla* of 1136, *Monumenta Poloniae palaeographica,* ed. Krzyżanowski, vol. I (Cracoviae, 1908); Rozwadowski, "Bulla z roku 1135", *Materiały Komisyi językowej Akademii Umiejętności w Krokowie,* IV (Kraków, 1909). From the fourteenth century onwards, Polish expressions, depositions of witnesses and forms of oaths appear in Polish in Latin court records, see *Starodawne prawa polskiego pomniki* (Warszawa, later Kraków, 1856 ff.), vols. I-III; *Archiwum Komisyi prawniczej,* vol. VIII (Kraków, 1907). The earleist extant MS in Polish is *Psalterz Floriański,* written in the fourteenth century; the earliest legal MS, the translation of the Statute of Casimir the Great, of 1347 (*Statut Wiślicki*), written in the fifteenth century, reprinted by Piekosiński in *Archiwum Komisyi prawniczej,* vol. III (Kraków, 1895); VIII (1905); facsimile reproduction in *Biblioteka Kornicka* (Poznań, 1876). See also Selishchev, *Slavic Philology* (in Russian, Moscow, 1940), I, 277 ff.

[6] Tadeusz Czacki, *O litewskich i polskich prawach, o ich duchu, zródłach* (Warszawa, 1800) I, 5; 19 ff.; also his *Czy prawo rzymskie było zasadą praw litewskich i polskich?* (Wilno, 1809). At the conclusion of this work, Czacki claimed that he had "proved that Roman Law was not the basis of our laws."

ate dispute which lasted for about half a century. It was only at the end of the nineteenth and the beginning of the twentieth century that methods of research came to be employed which eventually led scholars to a unanimous appraisal based on scientifically established facts.

The present study tries to unfold and to analyze the course of this controversy through the centuries. We begin with the arguments which suggest that Roman Law enjoyed great authority in Poland.

1. *Knowledge of Roman Law*

At the outset, it seems well established that knowledge of the sources of Roman Law—the Institutes, the Digest and the Code—and of their interpretations by the Glossators and by their successors was well spread in Poland. The historians of the Italian Universities of Bologna and Padua, cradles of the science of Roman Law, mention numerous Poles among the professors and students throughout the Middle Ages. Many of these, upon their return, occupied official posts in Poland which enabled them to exercise a strong influence upon legislation and the administration of justice.[7] Polish students were also enrolled in other Law schools of Europe.[8]

—*O litewskich i polskich prawach* was reprinted with Czacki's other works: *Dzieła,* ed. Raczynski (Poznań, 1843-1845), and separately (Kraków, 1861).

[7] In Bologna the following are mentioned: in 1270, *Poricius de Ursio Polonus, Johannes archidiaconus Polonus;* in 1278, *D. Domitianus presbyter Cracoviensis, Johannes de Milone de Polonia;* in 1282, *D. Vitus dictus Coparino de Polonia;* in 1285, *Mag. Stephanus de Polonia, D. Domitianus canonicus Wratislaviensis.* Around 1505 we find there Stanislaus Fogelwetr, later chaplain of Queen Anne; Andrew Patrycki (*Patricius*), secretary to the Queen; Marianus Lizentius; Peter Mieszkowicz, later bishop of Płock and Cracow; and, above all, Jan Zamoyski who later became famous as chancellor, the theorist and builder of the Polish "democracy of the gentry" (*infra,* sec. 3).—In Padua there are listed: in 1271, *Nicholaus archidiaconus Cracoviensis;* in 1351, *Fredericus Polonus;* in 1400, *Laurentius Polonus baronis Nicolai filius;* in 1418, another *Nicholaus archidiaconus;* in 1505, one *Martinus Polonus.*—These obviously incomplete lists are derived from Hube, *op. cit.,* p. 52, and Ossoliński, *Wiadomości historyczno-krytyczne* (Kraków, 1819), II, 350, who in turn used Facciolatti, *Fasti Gymnasii Patavini;* Papadopuli, *Historia Gymnasii Patavini;* Sarti and Fattorini, *De claris Archigymnasii Bononiensis professoribus* (Bononiae, 1769-1772, reprinted 1888-1896); and Przeździecki, *O polakach w Bononii i Padwie* (1853), mostly not available to this writer. For the sixteenth century, several names are taken from Costil, *André Dudith* (Paris, 1935), p. 88.

[8] Lappo, *The Lithuanian Statute of 1588* (in Russian, Kaunas, 1934), p. 82.

No less numerous were the foreign, especially the Italian, outstanding Romanists who went to Poland to teach there at the Universities and frequently to occupy high posts in the judiciary. It is sufficient to name, for the sixteenth century, Petrus Roysius (Ruiz Hiszpan—a Spaniard by origin) who was a judge in the Supreme Court of Lithuania, established for the review of cases decided by the municipal courts. Around that time, the Polish proverb was coined: *Co włoch to doktór*—in every Italian you meet a doctor.[9]

At the University of Cracow, founded in 1364, five chairs of Roman Law were established, and the Academy of Zamoście ardently advocated Roman Law.[10] Several books on Roman Law were written by Polish scholars of the sixteenth, seventeenth and eighteenth centuries.[11] Works of the Glossators and the Post-glossators were printed in Poland, e.g., the well known work of Johannes Andreae on judicial procedure appeared in Cracow in 1537.[12] Polish libraries, even those of remote Lithuania, contained source books on Roman Law: the Institutes, the Code, the Digest.[13]

[9] *Ibid.*, p. 52 f.

[10] Dąbkowski, *Prawo prywatne polskie* (Lwów, 1910), I, 22; Hube, *op. cit.*, p. 52; Statute of the University of Cracow, of 1364, printed in Helcel, *Starodawne prawa polskiego pomniki*, I (1856), 215. Dąbkowski's book is, next to Hube, the best study on the role of Roman Law in Poland.

[11] Jan z Turobina, *Enchyridion Juris Caesarei et Pontificii* (Cracoviae, 1507), and his *Processus utriusque juris* (1524, 1554, 1557); Starowolski, *Commentarii in IV libros Institutionum Juris Civilis* (Cracoviae, 1638); Drezner, *Similium juris poloni cum jure romano centuria una* (Parisiis, 1602); Pawel Orzechowski, *Manuale fundamentorum juris civilis ac poloni* (Bredae, 1647); Meciszewski, *Ustanowienia Prawa Cywilnego* (Kraków, 1785); Starowolski, *Monita legalia methodum in utroque jure studendi praescribentia* (Cracoviae, *s.a.*). See Hube, *op. cit.*, p. 53; Dąbkowski, *op. cit.*, I, 24.

[12] *Processus juris brevis Johannis Andreae per Georgium Samotulium ... cum practica exemplari in regno Poloniae circa strepitum fori spiritualis observari solita* (Cracoviae, 1537). In spite of the title, Hube believes that this book served also the lay lawyers; *op. cit.*, p. 62.—On the influence of Roman Law on the Polish procedure, see Taubenschlag, *Proces polski XIII i XIV wieku do Statutów Kazimierza Wielkiego* (Lwów, 1927); Kutrzeba, *Dawne polskie prawo sądowe w zarysie* (Lwów, 1921); cf. *infra.*, sec. 6.

[13] Lappo, *op. cit.*, p. 99; Maksimeiko, *The Sources of Penal Provisions of the Lithuanian Statute* (in Russian, Kiev, 1894), p. 158.—[Important new data concerning Roman and Canon Law in medieval Polish libraries would have been obtained upon completion of the researches of Dr. Adam Vetulani, on which the outstanding canonist of the University of Cracow first reported in his article, "Projet d'un catalogue des manuscrits juridiques du moyen-âge conservés dans les bibliothèques polonaises", *Collectanea Theologica*, XVIII

Finally, Polish international relations created a necessity for knowing Roman Law and for skill in pleading by arguments from it. For nearly two centuries, from the thirteenth to the fifteenth, the Polish kings were involved in a law suit with the Order of the Teutonic Knights for the sovereignty over Prussia. A decision of this controversy was sought not only on the battlefields but also before the high international tribunals of that time: the Roman-German Emperor and the Holy See.

Polish kings and Diets, when appointing committees for the purpose of codifying local laws, required that there be among the members also doctors of Canon and of Roman Law—*doctoribus etiam juris pontificii et legum adhibitis,* as King Sigismund I ordained in 1520,[14] or " doctors of foreign Laws ", as was required in the appointment of the committee for the revision of the Lithuanian Statute, in 1564.[15]

(1937), 436-451. According to our information, the project was well advanced when the war broke out; but it is feared that since 1939 most Polish libraries have been destroyed or robbed of their manuscripts by the invader.—Ed.]

[14] *Volumina legum* (1st ed.), I, 393; (2nd ed.) I, 178. The title, *Volumina legum,* is customarily applied to the chronologically arranged collection of the statutory laws of Poland, compiled by Józef Załuski and Stanisław Konarski. It covers in six volumes the period from 1347 to 1736 and was published in Warsaw, 1732-1739, under the title: *Prawa, Konstytucye i przywileje Królestwa Polskiego, etc.* Vol. I has also a Latin title: *Leges, statuta, constitutiones, privilegia regni Poloniae, etc.* The work was supplemented by a seventh volume covering the years 1764-1768, and an eighth volume for the years 1775-1780, both compiled by the College of Piarists (*Scholarum Piarum Collegium Varsaviense*). A ninth volume, containing the resolutions of the Diet passed in 1782, 1784, 1786, and 1788-1792, was published by the Polish Academy of Sciences in Cracow in 1889. The first eight volumes were reprinted by Jozafat Ohryzko (St. Petersburg, 1859-1860) as *Volumina legum.*

Although first privately issued, the collection acquired great authority and was elevated to an official source by the Duke of Warsaw in 1809. The text of the older statutes was reproduced in this work from earlier printed editions without a collation of extant MSS and is therefore of less value for historical research than various critical editions of such statutes, published in the nineteenth and the twentieth century, e.g. by Bandtkie, *Jus Polonicum* (Varsaviae, 1831); Helcel, *Starodawne prawa polskiego pomniki,* I (1856); Piekosiński, *Archiwum Komisyi prawniczej* and others.—[Modern critical editions of the medieval sources of Polish Law are briefly reviewed by Kutrzeba, " L'histoire du droit et des institutions politiques en Pologne: les travaux des cinquante dernières années ", *Revue historique de droit français et étranger,* 4, XVIII (1939), 64 ff.—Ed.]

[15] Lappo, *op. cit.,* p. 40.

2. *Opposition to Roman Law*

However, the cogency of these arguments for the authority of Roman Law in Poland is shaken by the blunt statements of some Polish jurists of high repute. For instance, in the course of the above-mentioned law suit against the Teutonic Knights, during one of the numerous trials, a certain Spytek of Melsztyn—Governor of Cracow, envoy of King Casimir the Great in 1357, and of Ladislaus Jagiełło in 1420—stated in reply to the arguments of the opposition: *Jus romanum in Polonia recusatur penitus.*[16] Cerazyn Kirsztajn (1507-1567), a judge and a writer in a field affiliated with Roman Law, *viz.*, the Law of Polish Municipalities (the so-called "Magdeburg Law"[16a]), thus rebuked Polish lawyers who were trained in Roman Law:

> "They know what the Roman Emperors said, but they are ignorant of what a Polish judge ought to know... Our people do not like Roman Law: it has to be studied for a long time, and one is forced to wander in it as in a forest, while among us everyone wishes to judge as his grandfather and great-grandfather handed it down to him."[17]

Litawor Chreptowicz, Marshal of Lithuania, in addressing King Alexander as the Grand Duke of Lithuania, in 1505, begged him in the name of the noblemen of the Grand Duchy "not to rule and judge us by Roman Law which is deceptive."[18]

But the most passionate condemnation of Roman Law was uttered by Stanislaus Orzechowski (*gente Ruthenorum, natione Polonus*), a great orator, leader of the small gentry (*szlachta*) in the Diet, legal philosopher and historian. His arguments are of special importance because they betray the underlying motive of the opposition to Roman Law:

[16] Maciejowski, *Historya prawodawstw słowiańskich* (2nd ed., Warszawa, 1865), V, 728.

[16a] See *infra*, sec. 3, text before n. 28.

[17] Kirsztajn, *O prawach i fołdrowaniu* (Kraków, 1529), cited from Dąbkowski, *op. cit.*, I, 23. Kirsztajn wrote also an *Enchiridion aliquot locorum communium juris Magdeburgensis* (1556; further editions, 1586, 1611, 1616; see also *infra*, n. 28).

[18] These words were related by a contemporary of Kirsztajn, Stryjkowski, *Kronika Polska, żmódzka i wszystkiej Rusi* (Warszawa, 1846), II, 293-294, and repeated by Czacki, *op. cit.*, p. 138.

> "*Quod principi placuit legis habet vigorem*—this is the first rule of the Imperial Law because of which Poles are disgusted with Roman Law. It would be ... difficult to find an official who knows the *jus civile*." [19]
> "The only laws which rule Poland are those of your liberty, noblemen, your dignity and your sovereignty; laws equally binding for you and for your King Sigismund. Nor is the king above the Law in your country; his private good is not a standard of what is just for you, nor is he permitted to do whatever he likes. These are the songs of Roman servitude which no one praises but he who is a slave—or an Italian: who, to become more servile, founded (God willing) the schools and made Doctors of Laws who taught him nothing but thraldom ..." [20]

It seems that the contempt for Roman Law was shared by Polish statesmen on the eve of Poland's partition. When Andrzej Zamoyski presented, in 1780, his draft of a Code of Laws, designed to reform Poland along liberal lines, he anticipated that the "Romanism" of the draft would be held against him. Somewhat apologetically he wrote that, although he had followed Roman Law in shaping the framework of his project, he was guided by the idea that "the Code is not intended for Romans but for my compatriots." [21]

Uncompromising as they are, the opinions quoted above are not conclusive. Bearing the distinct mark of political argumentation, they conceal rather than reveal the historical truth. The fate of Roman Law in other European countries, and Poland's external and internal circumstances, indicate the path along which the truth should be sought. For instance, voices of disdain similar to those

[19] *Djalog albo rozmowa około egzekucyi Polskey Korony* (1562; ed. Kraków, 1858), quoted from Hube, *op. cit.*, p. 53; Ossoliński (*supra*, n. 7), II, 204.

[20] "Vestrae libertatis, equites, vestrae dignitatis, vestrae maiestatis sunt illae leges quae in Polonia solae regnant ac ex aequo vobis et Sigismundo regi vestro imperant. Neque enim solutus est Rex legibus apud vos; non quod illi utile, id justum vobis, non quod lubet, illi licet. Romanae servitutis sunt ista carmina quae laudet nemo, nisi servus sit, aut Italicus qui quidem, ut certius serviret, scholas etiam sibi (si Diis placet) condidit Doctoresque legum fecit, a quibus nihil nisi servitutem disceret ..."—*Oratio in funere Sigismundi, apud Pistorium, vol. III, p. 47*, quoted from Ossoliński, *op. cit.* (*supra*, n. 7), II, 204, where the full Latin text is given. Orzechowski's life and philosophy were recently analyzed by Lichtensztul, *Poglądy filozoficzno-prawne Stanisława Orzechowskiego* (Warszawa, 1920), and by Mesnard, "Orzechowski", in *L'essai de philosophie politique au XVI^e siècle* (Paris, 1936), p. 408 ff.

[21] *Zbiór praw sądowych przez ex-kanclerza A. O. Zamoyskiego ułożony*, ed. by Dutkiewicz (Warszawa, 1874), p. iii. It was originally printed in 1780, in Polish, and in 1782, in German.

quoted above were heard in France, Germany and England.[22] They came from the social ranks of nobles, burghers and those local semi-vassal princes whose rights stemmed from medieval privileges or local customs. They all represented the *jus particulare,* local laws, while Roman Law by its origin was the *jus imperiale.* Acceptance of the entire *Corpus Juris Civilis* implied the danger of submission to the sovereignty of rulers who claimed to be the successors of the Roman Emperors, namely to the German Emperors of the Holy Roman Empire. Opposition to Roman Law virtually meant opposition to their claims.

Moreover, some few passages such as *quod principi placuit legis habet vigorem,* or *princeps legibus solutus est,* referred to by Orzechowski, actually were not at all characteristic of the spirit of Roman Law as a whole, and of Roman private law in particular.[23] They did not express a general principle, but were rules pertaining to specific problems of the public law of the Principate. It evidently was impossible for an immature legal mind to make a clear-cut distinction between such sayings and the lofty principles of legal order and justice which are so abundantly offered by Roman Law. Once understood, these principles would unswervingly make their way.

In the light of these considerations, we may discard the statements of Spytek of Melsztyn and Litawor Chreptowicz as purely political

[22] Cf. Zoepfl, *Deutsche Rechtsgeschichte* (4th ed., Braunschweig, 1871), I, 225; Stintzing, *Geschichte der deutschen Rechtswissenschaft* I (München, 1888), 57 ff.; von Below, *Die Ursachen der Rezeption des römischen Rechts in Deutschland* (München, 1905), p. 67 ff.; Brunner, *Grundzüge der deutschen Rechtsgeschichte* (8th ed., München, 1930), p. 258 ff.; Holdsworth, *A History of English Law,* IV (2nd ed., London, 1937), 228 ff., 240 ff.

[23] These maxims were frequently and easily misunderstood because they were quoted apart from their respective contexts. Thus, it is obvious that Ulpian (*Dig.* 1, 4, 1) had in mind to affirm the sovereignty of the people, since he deduces the principle, *quod principi placet, etc.,* from the fact that *populus ei et in eum omne suum imperium et potestatem conferat.* See also Papinian's definition of *lex,* which is derived from Demosthenes, in *Dig.* 1, 3, 1. Cf. Pomponius, *Dig.* 1, 2, 9 with *Cod.* 1, 17, 1, 7; *Cod.* Th. 1, 14, 4. See Kotliarevsky, *The Authority and the Law* (in Russian, Moscow, 1915), p. 172 ff.; Mommsen, *Römisches Staatsrecht* (3rd ed., Leipzig, 1887), II, ii, 751; McIlwain, "Medieval institutions in the modern world", *Speculum,* XVI (1941), 280. For the explanation of *princeps legibus solutus,* see Arangio-Ruiz, *Storia del diritto romano* (Napoli, 1937), p. 227 ff., and De Francisci, in *Bullettino dell 'Istituto di diritto romano,* XXXIV (1925), 321 ff. (References kindly supplied by Dr. Elio Gianturco.)

arguments. As for the law suit with the Teutonic Knights, it is rather noteworthy that later Polish pleadings in this case, e.g. those at the Council of Basel, in 1416, resorted to Roman Law.[24]

3. *Structure of the Polish Legal System*

A brief survey of the political and legal system in Poland from the sixteenth to the eighteenth century should help to evaluate the opinions of Orzechowski and Kirsztajn, and to form a judgment on the later dispute among the historians of Polish Law. During the period in question, Poland's public life was characterized by federalism, a variety of legal sources, and a democracy of a special kind which may be termed as "democracy of the gentry." The term, democracy, may be applied to Poland's political regime in this period because the supreme power was vested in elected representative assemblies, the federal Diet (*Sejm*) and the provincial Diets (*Sejmiki*), and because the members of a large class of the population, the military gentry (*szlachta*), enjoyed equal political and civil rights comparable to the rights of citizens in a modern democracy.

The foundations of the privileged status of the gentry were laid by the Statute enacted at Koszyce in 1374, and were developed by the Statute enacted at Nieszawa in 1454 which was included in the Enactments of the Diet, in 1496. The political function of the gentry was expressed in the *Constitutio "Nihil novi"*, adopted in the Diet at Radom in 1505, by which the king promised that "nothing new can be established by us and our successors without the common consent of the councillors and the deputies of the provinces."[25] But burghers were excluded, since the Statute of Piotrków (1496), from active participation in the political life of the *Rzeczpospolita Polska*—a literal translation of the Latin, *res publica polonica*. The rural population, finally, was gradually reduced to serfdom.

The Polish Commonwealth, as we shall call it, did not develop a unified legal system, and all the attempts in this direction, beginning with the so-called Statute of Laski (1505/6),[25a] ultimately failed. A plurality of sources of law remained the typical feature of Poland, down to its partition, and reflected the multi-racial and multi-reli-

[24] Maciejowski, *op. cit.* (*supra*, n. 16), V, 728.

[25] *Volumina legum* (*supra*, n. 14), I, 299 (2nd ed., I, 137). See also Sigel, *Lectures on Slavic Law* (London, 1902), p. 135.

[25a] *Infra*, sec. 5.

gious composition of the State. Regional, social and, to a certain extent, racial and religious sectionalism found strong expression in the Law. Various regions, social strata (nobles, burghers), national groups (Jews, Armenians, Vallachians) and ecclesiastical jurisdictions had their own laws. In deciding a case, the Polish courts had to resort in the first place to such special laws of a given region or group.[26] Separate local and central courts administered justice in the province of each *jus particulare*.

Let us bear in mind that Polish Law as a whole was primarily a customary law, *consuetudo*.[27] Royal decrees (*statuta, privilegia*) and enactments of the Diet (*constitutiones*) did not sufficiently cover all the fields of law and, moreover, were regarded primarily as written records or confirmations of established customs.

It is not surprising, therefore, that neither the old Polish jurists nor the modern historians of Polish law could agree on the role of Roman Law in Poland. Roman Law played a different part in the different jurisdictions embraced by the Polish Commonwealth. Some of these jurisdictions, *viz.*, the ecclesiastical ones, were mere local branches of universal legal systems. They will not be considered in this study, since the inter-relations of Roman Law with

[26] This was the unanimous opinion of authoritative Polish jurists prior to the partition of Poland. See e.g., Załaszowski, *Jus regni Poloniae ex statutibus et constitutionibus ejusdem regni M.D.L. collectum* ... (2 vols., Poznaniae et Varsaviae, 1700-1702; another edition, 1741), I, 16; 17; Miciński, *Syntagma juris regni Poloniae* (1702), p. 13: "...in primis ad jus particulare". Their view is shared by historians of Polish Law: Bandtkie, *Prawo prywatne polskie* (Warszawa, 1851), p. ix; Helcel, *Dawne prawo prywatne polskie* (Kraków, 1874), p. 15. Dąbkowski, *op. cit.* (*supra*, n. 10), I, 26; Hube, *op. cit.* (*supra*, n. 4), p. 68.

[27] The term, *consuetudo*, was constantly used by Polish jurists and by the statutes to designate law; e.g. "...jus commune quod in consuetudinibus consistit" (Dąbkowski, *op. cit.*, I, 41 ff.); Statute of Ladislaus Jagiełło (1422): "Nec audeant judices ... alios modos, ritus et consuetudines circa terminos et sentencias observare nisi illos, quos domini Casimiri liber et consuetudines doceant et informent ad quas semper recurrant" (*Volumina legum*, I, 84 [2nd ed., I, 37]). The general principle is well expressed in an edict by King Sigismund, of 1532, commonly known as *consuetudo approbata:* "In regno nostro non solum scriptae constitutiones, sed et consuetudines inveteratae pro lege in pluribus locis observantur" (*Volumina legum*, I, 500 [2nd ed., II, 247]). Cf. Helcel, *op. cit.* (*supra*, n. 26), p. 17; Dutkiewicz, *Program do egzaminu z historyi praw, które w Polsce przed wprowadzeniem kodeksu Napoleona obowiązywały* (Warszawa, 1863), p. 9; Handelsman, *Kara w najdawniejszym prawie polskim* (Warszawa, 1907), p. 226.

Canon Law, with the Law of the Eastern Orthodox Church, and with Jewish Law, are a problem of its own.

A similar problem is presented by that branch of the Law of Poland which is called *jus commune theutonicale in regno currens*, or *jus Magdeburgense* (in Polish: *Prawo Magdeburskie*), *jus municipale* (in Polish: *Prawo miejskie*). These terms designate the law which originated from the *Sachsenpiegel* and the *Weichbild*, law books used in Northern Germany from where numerous colonists had migrated to the Polish cities and villages. The Polish kings had granted to these settlers the privilege of retaining the law of their mother country. It was called "Magdeburg Law" because the law of this German city served as a model for the first privileges issued by the Polish kings. In an early period, appeals from the decisions of the Polish municipal courts could even be brought before the court of Magdeburg.[27a]

In Poland, this law gradually developed into the standard law of all self-governing municipalities, the law of the burgher class. It deviated in some aspects from its German prototype, especially after central courts had been established, one in Poland and one in Lithuania, for the review of cases tried in the first instance by the municipal courts. Magdeburg Law became synonymous with municipal self-government, regardless of the nationality of the burghers who constituted the population of the city. Granting a city the status of Magdeburg Law meant its elevation to a self-governing municipality. Thus, Wilno in Lithuania, and Kiev in Ukraine were governed by *Prawo Magdeburskie*.

There is no dispute that, in localities under the jurisdiction of this law, Roman Law acquired the quality of a subsidiary source.[28] In

[27a] Some of the Polish cities were given the law of the city of Kulm—*prawo chełmińskie*—, others that of Lübeck; both being offsprings of the German law books like the Magdeburg Law.—Some modern Russian authors contend that when Magdeburg Law was introduced in the Russian cities of Lithuania, it was done as a means of Polonization. Cf. Leontovich, "Contribution to the History of the Administrative System of the Lithuanian State" (in Russian), *Izvestiia* of the University of Warsaw, IV (1899), 7; Vladimirskii-Budanov, "German Law in Poland and Lithuania" (in Russian), *Zhurnal* of the Russian Ministry of Education, 1868, nos. 8-12.

[28] The role and the sources of Magdeburg Law were analyzed by Daniłowicz, *Survey of the Progress of Compilation of a Code for the Western Provinces* [of Russia] (in Russian, St. Petersburg, 1837; printed only in fifty copies for the Russian Imperial Codification Committee and reprinted by Baron

the words of Groicki, a Polish jurist of the sixteenth century:

> "Where no provision suitable for the decision of a given case is to be found in the books of Magdeburg Law, and if no privileged status is involved [i.e., if no other *jus particulare* is applicable], the Imperial [i.e., Roman] Law shall be applied." [29]

The elements of Polish Law thus far discussed—those of the ecclesiastical jurisdictions and of the municipalities—may be called foreign elements, in a sense, because they originated outside of Poland. The cardinal point, however, of our research lies in the law which grew on Polish soil: the law of the noble class (*Prawo ziemskie*) [30] in its two branches. They were the law common to all provinces (*jus universale, consuetudo communis, usus communis*),[31] and the regional laws, similar to the *Landrechte* of Germany (*consuetudo servata in certis terris*).[32]

Nolde, St. Petersburg, 1910), and by Kutrzeba, *op. cit.* (*supra,* n. 1), I, 199 ff., 211 ff. Chief among the old Polish writers on Magdeburg Law were Jaskier, *Juris provincialis, quod speculum Saxonum vulgo nuncupatur, libri tres* (Cracoviae, 1535; Samosci, 1602); Szerbicz, *Speculum Saxonum albo prawo Saskie i majdeburskie* (1581, 1610, 1646); Bishop Lipski, *Practicae observationes ex jure civili et Saxonico* (six editions, Cracoviae, 1602 to 1648).—The most important of all was Groicki who published several monographs on topics of the municipal law. His *Artykuły prawa Magdeburgskiego* appeared in 1558, *Porządek sądowy* and *Postępek* in 1559; five more editions followed. *Tytuły* appeared in 1567, 1573 and 1616. In 1619, 1629 and 1760, all these works were reprinted jointly with re-editions of Kirsztajn's *Enchiridion* (*supra,* n. 17). A monograph on Groicki was written by Kraushar, *Pierwsza książka prawnicza polska z wieku XVI* (Warszawa, 1905).

[29] Groicki, *Porządek sądowy* (Kraków, 1619), p. 7. See also his *Artykuły prawa Magdeburgskiego* (5th ed.), p. 57 and *Tytuły,* p. 38. Cf. Hube, *op. cit.,* p. 66; Maciejowski, *op. cit.* (*supra,* n. 16), V, 727-729.

[30] The term, *prawo* (law) *ziemskie,* originates from the word, *ziemian,* an old term for nobleman, and not from *ziemia* (land), cf. Dutkiewicz, *op. cit.* (*supra,* n. 27), p. 9; Linde, *Słownik języka polskiego* (Lwów, 1860), VI, 1060. In Latin it was called *jus nobilitatis, jus Polonum militare, ius nobilitatis terrestre.* It is, therefore, here translated as "law of the gentry", and not as "provincial law".

[31] Contained in two comprehensive codes—the Statute of Casimir the Great, enacted at Wislice in 1374; the Statute enacted at Warta in 1423—and in later enactments of the Diet.

[32] *Excepta Masoviae,* 1577; *Consuetudo Podlachiae,* 1569; *Jus terrestre nobilitatis Prussiae* (so-called *Korrektura Pruska*), 1598 and 1726; *etc.*

Somewhat apart from these truly Polish laws stands the Lithuanian Statute.[33] Although the Grand Duchy of Lithuania was united with Poland at the end of the fourteenth century, it is only as late as 1569 that their federation was definitely shaped, and even then the Grand Duchy retained its own laws. Prior to the union with Poland, the Grand Duchy had incorporated Russian provinces (White Russia and Ukraine) which had their own laws and a civilization of higher standard than that of the purely Lithuanian provinces. They constituted nine-tenths of the entire territory; moreover, the upper class of these Russian provinces was dominating in the

[33] The *First Lithuanian Statute* was promulgated in 1529. It was completely revised and promulgated again in 1566. The first version was written in Russian, in 244 sections, and translated into Polish in 283 sections. The first printed edition, by Działyński, *Zbiór praw litewskich* (Poznań, 1841), p. 143 ff., reproduced the Russian text in Latin characters; an edition in Russian characters appeared in *Vremenik* of the Moscow Society for the Study of History and Antiquities, vol. XVIII (Moskva, 1854).—The *Second Statute,* of 1566, was printed from the extant MSS in Russian, in the same *Vremenik,* vol. XXIII (1843), and in both the Polish and Latin translations by Piekosiński in *Archiwum Komisyi prawniczej,* VII (1900). Strangely enough, he did not mention the extant Russian MSS or the edition of 1843.

In 1569, a new treaty of union (federation) was concluded between Poland and Lithuania. On this occasion, the Ukrainian provinces of Lithuania were incorporated into Poland, with the promise that their laws would be left intact. Therefore, when a new revised Statute, the so-called *Third Lithuanian,* appeared in 1588, it took effect only in the other parts of the Grand Duchy, i.e., in Lithuania proper and in the White Russian provinces. The Statute of 1566 remained in force in Ukraine and is also known as the Volhynian Statute (after the name of one of the Ukrainian provinces). The Third Statute was printed three times in Russian, with the date of 1588, by the Mamonicz brothers in Wilno. A Polish translation was printed by the same, three times with the date of 1614, and reprinted together with some later enactments in 1619, 1648, 1693 and 1744, with an official preamble which states that these are the Polish versions of the authentic Russian texts. The editions of 1619, 1693 and 1744 were re-issued several times with the same dates. A new edition appeared in 1786, with a modified preamble which did not mention the Russian original. From this edition a translation into modern Russian was made and printed in St. Petersburg, 1811, together with the Polish text. A separate Polish edition appeared also in 1819.

For reference, see Kutrzeba, *op. cit.,* (*supra,* n. 1), II, 76; 82; Bershadskij, *The Lithuanian Statute and the Polish Constitutions* (in Russian, St. Petersburg, 1893); and the work of Lappo (cited *supra,* n. 8), *passim,* which is the latest, most comprehensive and scholarly study on the history of the Lithuanian Code. Cf. also Lappo, *The Grand Duchy of Lithuania* (in Russian; 1901), and his *Western Russia* (in Russian; Prague, 1924).

public life of the Grand Duchy. Russian became the official language of the Grand Duchy and gave way to Polish only after 1697.[34] All three of the consecutive Lithuanian Statutes (1529, 1566, 1588) were written and promulgated in Russian.

Lithuania thus was more than merely a province of Poland: she was an autonomous, formerly independent sister-State embracing other national and religious elements, a sister-State with a past of her own. In the preparation of the Lithuanian Statute only Lithuanian statesmen took part. Some of them, like Augustine Rotundus, "the learned mayor of Wilno," possessed an uncontested knowledge of Roman Law. One of the committees appointed for drafting the Statute consisted of an equal number of Roman Catholic and Russian Orthodox members.[35] The latter resorted in their work to those fragments of Byzantine codes (*Ecloga, Procheiron, Leges agrariae, etc.*) which were included in the compilation of ecclesiastical rules and Byzantine Law, known as *Nomokanon* or *Kormchaya* (Rudder-book)—a popular source of law in the Eastern Church.[36]

Not all Polish historians agree with their Russian colleagues on the nature of the Lithuanian Statute as a monument of Russian Law.[36a] But there is no doubt that some of the provisions of the Statute were taken from the ancient Russian Code.[37] Moreover, the Muscovite Russians, who were so often at war with Poland and Lithuania, did not consider the Statute as a foreign Code; they even used it extensively (for 175 articles) in composing the Code of Czar Alexis, of 1649.[38] In the records of the high administrative bodies

[34] *Volumina legum,* V, 1863 (2nd ed., V, 418). See also Piekosiński, *Archiwum Komisyi prawniczej,* VII (1900), iii.

[35] For the history of the codification, see Lappo, *op. cit., passim;* for the influence of Byzantine Law, *ibid.,* p. 99 ff.

[36] Gsovski, "Roman Private Law in Russia", *Bulletins of the Riccobono Seminar,* 1939, nos. 31, 35 (part I also in *Bulletino dell'Istituto di diritto romano,* XLVI [1939], 363 ff.).

[36a] For representative Russian opinion, see e.g. Leontovich, "Russian Truth and the Lithuanian Statute" (in Russian), *Izvestiia* of the University of Kiev, 1864, nos. 2-4; *id.,* "Sources of the Russo-Lithuanian Law" (in Russian), *Izvestiia* of the University of Warsaw, 1894; and the same author's *History of Russian Law* (in Russian; Warszawa, 1902), I, nos. 4196-4270. Cf. also the works of Lappo and the authors cited in the following notes.

[37] The titles on courts, guardianship, and robbery are derived from *Russkaya Pravda* of the eleventh century.

[38] Vladimirskii-Budanov, "The Code of Czar Alexis and the Lithuanian Statute", *Sbornik gosudorstveňnykh znani,* ed. Bezobrazov, vol. IV (1877).

at Moscow, instructions were found as to the application of certain provisions of the Lithuanian Statute by the courts of Muscovia.[39]

The Lithuanian Statute outlived the partition of Poland. It remained in force in the provinces incorporated by Russia, until 1840 when the—then revised—General Code of the Russian Empire was introduced there.[40] However, this Code itself had taken many provisions from the Lithuanian Statute, some as general rules of law, some as particular law for the Ukrainian provinces only.

Even in the purely Polish parts of Poland, prior to the partition, the Lithuanian Statute had gained an unofficial authority.[41] While in these parts all attempts at a comprehensive codification, after the Statute of Casimir the Great (1347), had failed, the Lithuanian Statute covered many fields of both public and private law and represented, in general, for its time a high standard of legislation.

4. *Relation of Roman Law to the Lithuanian and the Polish Statutes*

What, then, was the relation of Roman Law to the Lithuanian Statute and the statutes of Poland proper? No clauses are to be found in these statutes which would point to Roman Law as an official and immediate source of law in Poland. However, the dearth of such a proviso does not solve our problem. In Western Europe, too, the revival of Roman Law—the "reception," in the language of legal historians—was not everywhere based upon its recognition as being of official authority. The true moving force of this process in the West was the intrinsic, immanent value of Roman Law as a method of legal reasoning. For many European jurists of the sixteenth century it was, in the words of the French jurist, De Thou, *la raison écrite*—pure written reason. For others it was, in the words of his contemporary, Maître Pierre Lizet, *notre droit commun*, that is, a universal, a common law which rises over and above the narrow local or particular rules. Roman Law offered a method of cementing scattered heterogeneous provisions into a legal system.

[39] Vladimirskii-Budanov, *Chrestomathy of the History of Russian Law* (in Russian; 4th ed., Kiev, 1901), III, 68-74.

[40] Ukase of June 25, 1840, *Complete Collection of the Laws of the Russian Empire* (in Russian), 2nd series, no. 13, 591. Cf. Baron Nolde, *Outline of the History of the Codification of the Local Laws under Count Speransky*, vol. I: *Lithuanian-Polish Law* (in Russian; St. Petersburg, 1906).

[41] Dąbkowski, *op. cit.* (*supra*, n. 10), I, 6.

Thus, wherever Roman Law was not enforced *ratione imperii,* by virtue of an official authority, it scored its triumph *imperio rationis,* by virtue of its appeal to the learned judge, attorney, and legislator.

In this respect the voices of Polish jurists who pronounced themselves against Roman Law are counterbalanced by others. Thus, Ostrowski, who on the eve of the partition wrote a comprehensive treatise on Polish private law—the most complete work in this field —says:

> "Our entire heritage shows clearly that our kings followed Roman Law even in the system in which they compiled their legislation. A comparison of the laws of Justinian with our Polish and Lithuanian Statutes is sufficient to make this clear ... That Roman Law was highly esteemed in our country is evident from the clause in the Lithuanian Statute which expressly requires Roman Law to be applied in default of a provision in the Statute. The laws of the Polish Crown [of Poland proper] do not state this, but it suffices that they were made in the spirit of Roman Law." [42]

Likewise, two other (slightly earlier) authors of comprehensive works on Polish private law, Miciński [43] and Załaszowski,[44] insisted —as did later Bandtkie,[45] a historian of Polish Law—that Roman Law was considered a subsidiary source in Poland. Miciński advised the judge to resort

> "in primis ad jus particulare, deinde consuetudinem rationabiliter introductam, item praejudicata; tandem ad jus commune regni, hoc est statuta [i.e., royal decrees] et constitutiones [i.e., resolutions of the Diet]; his tandem deficientibus ad jus commune Romanum."

If one compares, however, these opinions with the primary sources, one will have to modify them. The passage of the Lithuanian Statute referred to by Ostrowski does not mention Roman Law directly. It reads (title IV, section 54):

> "Wherever there might be something lacking in this Statute, the court shall resort to the best concept of justice according to its conscience and shall proceed and judge in this case by the example of *other Christian laws.*"

[42] Ostrowski, *Prawo cywilne narodu polskiego ... porządkiem praw rzymskich ułożone* (Warszawa, 1784 [2nd ed., 1797]), I, 2. A German edition of this book appeared under the title, *Civilrecht der polnischen Nation,* 2 vols. (Berlin, 1797; Leipzig, 1802).

[43] *Op. cit.* (*supra,* n. 26).

[44] *Op. cit.* (*supra,* n. 26).

[45] *Op. cit.* (*supra,* n. 26).

Although some scholars raised doubts as to the exact meaning of the words, "other Christian laws",[46] it seems well accepted now that Roman Law was meant.[47] This is supported by some contemporary court records. Thus, at a trial in the provincial court of Wilno, in 1591, a certain Jan Velichko pleaded: [48]

> "Because in our statutes applicable to noblemen we do not have any exact explanation and instruction for making wills in time of plague, I refer to, and show the explanation, example and instruction on this point, described in the Imperial Law."

He then showed

> "two Imperial books in which, namely in the second book so named, it is written in these words in that second book, in the tenth article [commenting] on the books of Emperor Justinian dealing with wills in time of plague..."

Velichko referred also "to other books which he called Bartolus on Imperial Law, Book XXVII, article 13." We thus see a practitioner pleading his case before the Court of Lithuania by referring to the original sources and the medieval commentators of Roman Law.

A distinct influence of Roman Law upon the provisions of the Third Lithuanian Statute was established by Daniłowicz [49] who, however, believed this influence to be only indirect, through Canon Law and Magdeburg Law. But Lappo has recently shown that there is every reason to assume that among the compilers of the Statute there were enough jurists trained in Roman Law who could have used the *Corpus Juris Civilis* directly, and that copies of the Institutes, the Digest and the Code were available in Lithuania.[50] An admirable work by Taubenschlag has shown that the Second Lithuanian Statute, in the process of its translation into Latin, un-

[46] Hube, *op. cit.* (*supra,* n. 4), p. 68.

[47] Dąbkowski, *op. cit.* (*supra,* n. 10), p. 28.

[48] *Akty* published by the Archives of Wilno (in Russian), XX, 67, quoted from Lappo, *op. cit.* (*supra,* n. 8), p. 98.

[49] "Historischer Blick auf die Litthauische Gesetzgebung", *Dorpater Jahrbücher,* II (1834), 385-393, 481-491. This article later appeared also in Polish, "Historyczny rzut oka na prawodawstwo narodu litewskiego", *Wizerunki i roztrząsania naukowe,* 2nd series, XIII (Wilno, 1837), 107-111, and in Russian, in *Iuridicheskiia zapiski,* ed. Riedkin (Moskva, 1841).

[50] Lappo, *op. cit.,* p. 93 ff.

derwent considerable Romanization. Not only were the rubrics and titles borrowed from Roman Law, but the provisions themselves were reshaped after the Roman pattern.[51]

An altogether different conclusion is suggested by an analysis of the *Statuta* of the purely Polish part of Poland which, according to Ostrowski, were supposed to be written "in the spirit of Roman Law".

The Code of Casimir the Great, of 1347 (*Statut Wiślicki*) has some indirect references to Roman Law, but these are mostly followed by rules which either are not particularly Roman, or which deal with minor questions. The same is true of *Statut Wartski*, of 1420. Neither Statute has a clause similar to that of Lithuania, title IV, section 54, quoted above. The references in the Polish Statutes show no more than that the legislators had high esteem for Roman Law and referred to it with the sole purpose of adding prestige to their own rules.

Thus, the opening passage of section 63 of the Code of Casimir the Great[52] reads: *Quamvis occidens hominem secundum legum sanctiones foret capitali poena plectendus . . .*, and the words, *legum sanctiones*, seem to indicate Roman Law. But the rule following this introductory clause certainly departs from Roman Law, by establishing *wergeld* as penalty: *statuimus quod occidens militem* [i.e., a nobleman] *triginta marcas . . . solvere tenetur*". Contrary to the claim of some scholars, we do not see any resemblance of this provision with *Dig.* 48, 7, *ad legem Corneliam de sicariis*.

Likewise, section 69 starts: *Ex lege imperiali* [i.e., Roman law] *clara luce nobis constat quod incendiarii et exustores domorum . . .*

[51] Taubenschlag, *Wpływy rzymsko-byzantyńskie w drugim Statucie Litewskim* (Lwów, 1933); also "Gli influssi romano-bizantini sul secondo Statuto lituano", *Studia et documenta historiae et iuris*, III (1937), 42-62.

[52] The earliest editions of *Statut Wiślicki* and *Statut Wartski* appeared in the fifteenth century (no place, no date); they were reprinted in 1505 by Laski (*infra*, n. 57) and later in the *Volumina legum*. The editions by Bandtkie, *Jus Polonicum* (Varsaviae, 1831), and by Helcel, *Starodawne prawa polskiego pomniki*, I (1856), are enlarged with articles not found in Laski. New MSS were reproduced by Jiriček Hermenegild, *Svod ziakonův slovanských* (Praha, 1880), and in *Pamiętnik Warszawski*, XVII (Warszawa, 1817). The latest critical edition of all available Latin texts was made by Ulanowski, *Archiwum Komisyi prawniczej*, II (1893), IV (1921). For early Polish translations, see *supra*, n. 5. Cf. Kutrzeba, *op. cit.* (*supra*, n. 1), I, 178.—In the following quotations, numbers of the sections are given as in Bandktie, *op. cit.*

voluntarii morte crudeli et turpissima puniantur . . . But it proceeds, not to prescribe any similar punishment, but to solve a question of competence peculiar to Poland: *statuimus: in civitatibus aut villis theutonicalibus in forum ipsorum trahantur et in jure polonico coram judice competenti teneantur.*

Section 67 begins with a maxim of Roman Law: *actor forum rei undique sequi debeat,* but for the rest deals with a minute question of jurisdiction over counter-claims.

In the early printed editions, but not in the manuscripts, the *Senatusconsultum Macedonianum* is mentioned by section 80 which, even as section 62, deprives parricides and fratricides of the right of succession.

These four are the only passages in a rather large piece of legislation which are related in some way to Roman Law. It thus seems that the eminent Polish scholar, Romuald Hube, was right when he thought that the Code of Casimir the Great was " a truly national creation " but that the form in which the national material was presented shows some training of the compilers in Roman Law.[53]

Similarly, the only two references to Roman Law in the *Statut Wartski* of 1420 are rather inconclusive. In section 19,[54] mention is made of *jura et canonica et civilia* in support of the prohibition, *ne Judaei super literas et inscriptiones pecunias mutuent, sed solum super pignora,* which obviously is far from being Roman Law.

Section 31 begins: *In lege Imperiali continetur quod servi illiberi . . . non possint de manibus dominorum suorum liberari nisi per eosdem fuerint manumissi,* but passes from this premise to relations peculiar to a feudal Polish village.

The students of the University of Cracow were the only people who, according to the Statute of the University issued by Casimir the Great, were to be tried in cases of a major crime *juxta leges,* i.e., under Roman Law.[55]

" After the *Statut Wartski,*" says Hube, " there is not one statute as far as we know, and—what is more—not one constitution from the period of elected kings, which would directly resort to the pres-

[53] Hube, op. cit., p. 54. See also his work, *Ustawodawstwo Kazimierza Wielkiego* (Warszawa, 1881), and Handelsman, *Prawa karne w Statutach Kazimierza Wielkiego* (Warszawa, 1909), p. 101 ff.

[54] Numbers of sections as in Bandtkie (*supra,* n. 52).

[55] Helcel, *loc. cit.* (*supra,* n. 10).

tige of Roman Law".[56] This statement holds firm in the light of modern research. We may conclude that the true Polish *prawo ziemskie*, in contrast to the Lithuanian Statute, did not admit Roman Law as a subsidiary source.

5. *Roman Law as a Guide in Legislative Projects and Legal Writings*

When we turn, however, to the attempts at codification of Polish Law, undertaken by order of the kings, we find that the compilers invariably resorted to principles of Roman Law in order to bring the scattered national laws into a system and to fill the gaps therein. Comprehensive treatises by various authors show the same tendency.

When Chancellor Laski was commissioned, in the sixteenth century, to compile a code, he followed Roman Law and even inserted the treatise, *Summa utriusque juris*, by an unidentified Italian master Raimundus of Naples, in his compilation. Although the code never received any official sanction, it was printed in 1506[57] and was used for all later compilations, including the *Volumina legum*.

Jakób Przyłuski compiled another code by order of King Sigismund August. It was submitted to the Diet of 1553 but not approved by it. Przyłuski did not confine himself to a mere collection of the existing laws, but added introductions and commentaries derived from Roman and Canon Law, with the aim to fill the gaps in local laws. We find there, e.g., a long treatise *de statu mulierum* dealing with marriage and matrimonial contracts, as well as treatises on contracts in general, on torts, on the statute of limitation and adverse possession, *etc.*[58]

Four outstanding comprehensive treatises on Polish private law, all written before the partition of Poland, followed the same principle of offering an exposé of Roman Law on all those subject matters which were insufficiently covered by national law. The respective authors are: Drezner, professor at the Zamoyski Academy (1613), Załaszowski, of the University of Cracow (1702), Miciński

[56] Hube, *op. cit.*, p. 56; Dąbkowski, *op. cit.* (*supra*, n. 10).

[57] Laski, *Commune inclyti Poloniae regni privilegium* (Cracoviae, 1506).

[58] *Jus seu statuta et privilegia regni Poloniae methodice digesta* (Cracoviae, 1553), pp. 480-485, 496-497, 514-518, 526-527, 537-538, 540-544.

of the same University (1746), and the learned priest Ostrowski (1794).[59]

But when these men assigned to Roman Law the role of a subsidiary source,[59a] it was no more than as a suggestion or advice. They rather showed the law as it should be than the law as it was. They continued the plea of earlier jurists—a plea which shows that the application of Roman Law had not yet come true—such as that of Petrus Roysius (Ruiz) who addressed King Sigismund in the sixteenth century:

> "If ever your Poles, following under your leadership the example of the rest of Europe, were to lean in instances not encompassed by their own law toward Roman Law, they would not err in the least..."[60]

or of Jan Ostroróg, the outstanding statesman and writer of the fifteenth century who said that

> "meliora jura excogitari non possunt quam quae centum patres invenerunt dignitissimique imperatores..."[61]

The universal appeal of Roman Law to the legal mind is well expressed by all these men of learning and of practical experience who belonged to different periods of Poland's past. For a Polish jurist, as for so many European jurists, Roman Law was shining as a guiding star to unity in law; to unity in formal methods of

[59] Drezner, *Institutionum regni Poloniae libri IV* (Zamoscii, 1613); see also his book cited *supra*, n. 11; Załaszowski, *op. cit.* (*supra*, n. 26); Miciński, *op. cit.* (*supra*, n. 26); Ostrowski, *op. cit.* (*supra*, n. 42). An earlier treatise by Zaborowski, *Tractatus de natura jurium* (1507), contains references to Roman Law and to the Glossators, Kutrzeba, *op. cit.* (*supra*, n. 1), I, 273.

[59a] See *supra*, sec. 4, text at n. 42 ff.

[60] "Si Polonis tuis, te auctore, totius prope Europae exemplo permotis in mentem aliquando tandem veniat, ut cum [legibus] suis deficiuntur, illis [Romanis] utantur, nihil quidquam mea sententia peccabitur..." He concludes: "...negare non possumus Romani juris scientiam esse pernecessariam; id quippe, cum illud quod proprium habent, sive Saxonicum sive Magdeburgense, minus plenum est, tanquam commune usurpant litigatoribusque reddunt." —*Dedicatio in Decisiones Lithuaniae Didiciones Petri Royzii Maurei Alcagnensis, Regii Jureconsulti, de rebus in Sacro auditorio Lithuanico ex appellatione judicatis* (Cracoviae, 1560 [according to Czacki], 1562 [thus Lipenius], 1570 [thus Struvius]; Francofurti 1570), quoted from Ossoliński, *op. cit.* (*supra*, n. 7), II, 370, where the full Latin text is given.

[61] Printed in *Starodawne prawa polskiego pomniki*, V (1878), 129, art. 32.

finding substantial, uniform justice over and above legal localisms, and of supplying coherence to the scattered rules of law. As Lisiecki in the seventeenth century put it:

> "A Pole who knows Polish Law can judge well *causam suae patriae,* but one who knows also the source of all law, the Roman Law, can much better judge *et suae patriae causam et omnem causam.*" [62]

Thus Roman Law, although it did not attain official authority in Poland, was accepted by learned jurists as a guide for the study of domestic legislation and for the framing of national codes.

6. *Roman Law in the Practice*

There remains the problem of the influence which Roman Law might have exercised through the learned jurists. Did Roman concepts find their way to Polish courts, and did the administration of justice in individual fields rely on these concepts in the individual legal institutes, such as contracts, property, criminal law, *etc.?*

The time for an exhaustive answer has not yet arrived. Institutional comparison has been made only in some fields. The vivacious dispute among legal historians which was started by Czacki in 1800, and in which Bandtkie, Iwanowski, Ołdakowski, Potocki, Daniłowicz, Mićkiewicz, Morze, Ossoliński, Jakób Herz, Lelewel, Szadbej and Wiszniewski took part,[63] virtually cleared only two things: namely that in the various jurisdictions of the Polish Commonwealth Roman Law played various roles, and that the emphasis laid by an author on one or the other jurisdiction would determine this author's opinion. Besides, in this learned dispute political reasons are traceable much the same as in the similar disputes of the sixteenth and seventeenth centuries. In a time when the independence of Poland was lost, the desire to find in the past strong manifestations of national individuality clouded the objectivity of research in many Polish scholars.

In order to prepare a definitive solution, our problem should be separately studied for the separate fields of law, and separately for the subdivisions of Polish legal history through the centuries. Certain contributions have already been made in this direction. Taubenschlag, Makarewicz, Hube and Handelsman have covered the

[62] *Tribunał główny korony* (1638), p. 70, quoted from Makarewicz, *Polskie prawo karne, Część ogólna* (Lwów, 1919), p. 30.

[63] See *infra,* "Additional note".

penal law of the Middle Ages. They practically concur in the opinion formulated by Taubenschlag:

> "It is beyond doubt that Polish [criminal] law developed to a certain extent under the influence of Roman Law. But this influence was rather insignificant: it was confined to the reception of the concept of *crimen laesae majestatis*, and to the reception of the penalty for this crime, for arson and for rape." [64]

A study of ancient Polish procedure led Kutrzeba to the conclusion that "Polish procedure developed without any influence from without." Any similarity to be found between Polish procedure and that of other legal systems was explained by him as due to a similarity of social conditions, not to influence.[65] However, for the period prior to Casimir the Great, Taubenschlag, substantiating the opinion of Hube, has definitely established the contrary, namely a strong influence of the medieval Italian manuals of Romano-Canonical procedure on the Polish practice.[66] Taubenschlag's studies on the forms of legal documents in private law prior to the fourteenth century have shown a similar influence of Roman Law, in its Italian as well as in its German interpretation.[67] But the period which the

[64] Taubenschlag, *Prawo karne polskiego średniowiecza* (Kraków, 1934), pp. 3-4; "Das Strafrecht des polnischen Mittelalters", *Zeitschrift für vergleichende Rechtswissenschaft*, LI (1937), 284 ff. Cf. Hube, *Ustawodawstwo* (*supra*, n. 53); Handelsman, *Prawo karne* (*supra*, n. 53), p. 111 ff.; Makarewicz, *op. cit.* (*supra*, n. 62), pp. 19-31.

[65] Kutrzeba, *Dawne polskie prawo* (*supra*, n. 12), p. 58.

[66] Taubenschlag, *Proces polski* (*supra*, n. 12); Hube, *Prawo polskie w wieku trzynastym* (Warszawa, 1874), pp. 31-35. On the influence of Roman and Canon Law in the matter of written summons (*citatio*), there has been a controversy between Vetulani, "Pozew sądowy w średniowiecznym procesie polskim", *Rozprawy Wydziału historyczno-filozoficznego* of the Polish Academy of Sciences, LXV (1925), 67 ff., and Taubenschlag, "Geneza pozwu pisemnego w średniowiecznym procesie polskim", *ibid.*, LXVIII (1931), no. 3; cf. again Vetulani, "Wpływ zasad procesu rzymsko-kanonicznego na Polski pozew pisemny w średniowieczu", *Przewodnik historyczno-prawny*, II (Lwów, 1931), 253-270, and Taubenschlag, "Jeszcze o genezie polskiego pozwu pisemnego", *ibid.*, pp. 272-293; "La citazione scritta nel processo polacco medioevale", *Studia et documenta historiae et iuris*, I (1935), 307-318.

[67] Taubenschlag, "Dokumenty polskie w sprawach prywatnych XII i XIII wieku", *Sprawozdanie* of the Polish Academy of Sciences, XXXIX, number 4; *Formularze czynności prawno-prywatnich w Polsce XII i XIII wieku* (Lwów, 1930); "Die italienischen Formelbücher in Polen im XIII. Jahrhun-

present article attempts to cover, from the fourteenth to the end of the eighteenth century—a period for which abundant administrative and court records have been published from Polish archives—is still an open field for monographic investigation.

Although so much disputed as to its role in Poland in the remote past, Roman Law eventually found its way to Poland. After the partition, the Napoleonic Codes were adopted, with some modifications, in Russian Poland; Prussian *Landrecht* and, later, the German Civil Code of 1900 became the law of German Poland, and the Austrian Civil Code, of Austrian Poland. All these codes were at least indirectly based on Roman Law. When Poland, after her resurrection, unified her laws, in many fields the new codifications went along the lines of the Romanistic jurisprudence of other European countries—the very offspring of Roman Law.[68] When freed again from her aggressors, Poland hardly will abandon this path.

Additional Note on the Controversy Among Polish Legal Historians of the Nineteeth Century

In 1800, Czacki, *O litewskich i polskich prawach* (*supra*, n. 6), proclaimed that Roman Law had never influenced Polish Law and admitted only some nordic influences. Against him, Bandtkie, *De studio iuris polonici* (Vratislavae, 1806) and *Vindiciae juris romani Justinianaei* (Vratislavae, 1808), tried to prove that Roman Law was considered as a subsidiary source and to point out similarities between Roman Law and the Statute of Casimir the Great. Czacki replied with *Czy prawo rzymskie ...* (*supra*, n. 6). The dispute was reported in *Pamiętnik Warszawski, zeszyt październikowy*, 1809, pp. 323-333. Czacki considered the idea of an influence of Roman Law as harmful to the Polish national movement and did not hesitate to attack the romanizing Polish jurists of the past with outright personal remarks.

His opinions were opposed by Ołdakowski, *O przyczynach upowszechnienia i trwałéj powagi prawodawstwa Justyniana* (Krzemienec, 1814); Potocki, "Spostrzeżenia o dziele T. Czackiego", *Pamiętnik Warszawski*, 1815, ii, 194 ff., 335 ff.; iii, 217 ff.; Ossoliński, "O prawie rzymskiem w Polsce", *Wiadomości historyczno-krytyczne*, II (Kraków, 1819), 325-371; Bandtkie, *Zbiór rozpraw o przedmiotach prawa polskiego* (Warszawa, 1812).

In 1822, the Law School of Wilno offered a prize for the best study on the influence of Roman Law upon Polish legislation. Two of the studies were

dert", in *Mnemosyna Pappoulia* (Athens, 1935); "Il diritto romano nei documenti polacchi medioevali", *Acta Congressus Iuridici Internationalis*, II (Romae, 1935), 359-375.

[68] Gsovski, *New Codes of the New Slavic Countries* (Washington, D. C., 1934).

printed: Mićkiewicz, "Jaki wpływ prawodawstwo rzymskie na prawodawstwo polskie i litewskie mieć mogło", *Dziennik Warszawski*, I (1825), 457 ff.; II (1825), 133 ff., and Morze, "O wpływie rzymskiego prawodawstwa na prawodawstwo polskie i litewskie", *ibid.*, IV (1826), 37 ff., 70 ff.; V (1826), 112. Both of them supported Czacki. In 1825, the Law School of Warsaw announced as the subject of the annual prize essay an investigation of the passages in Kadłubek's chronicle in which Roman Law is mentioned. The prize essay was written by Iwanowaski (Janowski) a pupil of Bandtkie; the work is cited *supra*, n. 4. To his critics Iwanowski replied in "Kilka słow odpowiedzi", *Themis Polska*, II (1828), 101-119.

In the controversy the following also took part: Szadbej, "Kurze Beantwortung der Frage, ob nach dem polnischen Rechte Erbverträge gültig geschlossen werden können", *Zeitschrift für Oesterreichische Rechtsgeschichte*, VIII (1827), 88 (he denied that Roman Law was *jus commune* and doubted whether it was a subsidiary source); Daniłowicz, *Historischer Blick* ... (*supra*, n. 49; he admitted but a superficial influence); Herz, *Geschichtliche Darstellung der Gesetze und Gewohnheiten, welche im Königreich Galizien und Lodomerien vor dessen Einverleibung mit Oesterreich verbindende Kraft hatten* (Wien, 1835), p. 70 f.; Wiszniewski, *Historya literatury polskiej* (Kraków, 1840), II, 308-309; 436-446; Lelewel, "Prawo rzymskie jakim sposobem w Polśce w sprawach kryminalnich użyte bylo", *Themis Polska*, I (1828), 97 ff., 139; *Początkowe prawodawstwo polskie ... z czasów Jagiełłońskich* (1828), and *Krytyczny rozbiór Statutu Wiślickiego* (1828), all later included in vol. III of his *Polska wieków średnich* (1850); Maciejowski, *Historia juris romani* (Varsaviae, 1825), pp. 231-246 (in his later work, *Historya prawodawstw słowiańskich* [2nd ed., Warszawa 1865; also in German, *Slavische Rechtsgeschichte*], he gave very little attention to the problem).

Later scholars more and more turned to research in individual institutions and departments of the law, as was most admirably done by Hube in his studies cited *supra*, nn. 4, 53, 66; see also his *Prawo polskie w 14-tym wieku, Ustawodawstwo Kazimierza Wielkiego* (Warszawa, 1881); *Sądy ich praktyka* (Warszawa, 1886); Burziński, *Prawo polskie prywatne* (Kraków, 1867), I, 127; 292; Dutkiewicz, *op. cit.* (*supra*, n. 27), p. 6 f; Helcel, *op. cit.* (*supra*, n. 26), pp. 20-25; Dąbkowski, *op. cit.* (*supra*, n. 10), I, 22-28; also his *Charakterystika prawa prywatnego polskiego* (Lublin, 1923), pp. 9, 37; Handelsman, (*supra*, nn. 27 and 53); Makarewicz (*supra*, n. 62); Kutrzeba (*supra*, n. 12); Vetulani (*supra*, n. 66); and in particular Taubenschlag whose various articles and monographs (*supra*, nn. 12, 51, 64, 66, 67) are remarkable for the precise and consistent application of critical comparative methods. Unfortunately Taubenschlag's last monograph, *La storia della recezione del diritto romano in Polonia fino alla fine del secolo XVI* (Bologna, 1939), in which a synthesis of his previous investigations is given, is not available in this country.

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